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APPENDIX

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-985

THE CALIFORNIA BANKERS ASSOCIATION,
Appellant,

VS.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellees.

No. 72-1073

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellants,

VS.

THE CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., et al.,
Appellees.

No. 72-1196

FORTNEY H. STARK, JR., et al.,
Appellants,

VS.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellees.

On Appeals from the United States District Court for the Northern District of California

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Jurisdiction Statement in No. 72-985 Filed January 12, 1973
Jurisdiction Statement in No. 72-1073 Filed February 5, 1973
Jurisdiction Statement in No. 72-1196 Filed March 2, 1973
Probable Jurisdiction Noted October 9, 1973

DOCKET ENTRIES

The California Bankers Association vs. John B. Connally

United States District Court
for the Northern District of California
No. C 72-1157 WTS

DATE 1972	PROCEEDINGS
June 22	1. Filed Complaint, issued Summons.
	2. Filed Order for Service Other Than U.S. Marshal (Craig Adryan) (Clerk).
	3. Filed Notice of Related Cases.
29	4. Filed Motion for Temporary Restraining Order, with Points and Authorities and Affidavit of Robert H. Fabian.
29	Case No. 72-1045 was consolidated with this case for the purposes of hearing Temporary Restraining Order. After hearing, ordered further hearing continued to June 30, 1972, at 4:00 p.m.
30	5. Filed Notice re: Convening of Three Judge Court (Judge Sweigert)
	Further order that a temporary restraining order has been granted, in part; and the hearing on application for preliminary injunction has been set for July 20, 1972, at 10:00 a.m. Further ordered that this action has been consolidated with *Stark v. Connelly*, No. C-72-1045, in which a three-judge court has already been appointed, composed of Judge Oliver D. Hamlin, Judge William D. East & Judge Sweigert.
July 7	6. Filed Notice of Motion and Motion for Preliminary Injunction; calendared for July 17, 1972 at 10:00 a.m.
	7. Filed Notice of Motion and Motion for Order Extending Temporary Restraining Order; calendared for July 17, 1972, 10:00 a.m.
13	8. Filed Motion to Dismiss by the defendants.
	9. Filed Opposition to Motions for Preliminary Injunctions, by the defendants.
	10. Filed Motion to Dismiss by the defendants.
	11. Filed Order Shortening Time for Hearing Defendant's Motion to Dismiss on July 17, 1972, at 10:00 a.m.
	12. Filed Notice of Motion to Dismiss by the Defendant to be heard at 10:00 a.m., July 17, 1972.

DATE 1972	PROCEEDINGS
July 17	Three judge hearing, plaintiff's Motion to Amend Complaint by Adding More Parties granted; plaintiff's Motion for Preliminary Injunction and defendant's Motion to Dismiss submitted; Motion to Extend Temporary Restraining Order Pending Decision granted. (Judges Hamlin, Sweigert & East)
Sep 11	Filed Memorandum of Decision. (Judges Sweigert and East, with Hamlin dissenting and concurring) (No. 72-1045-WTS).
21	13. Filed Notice of Lodging of Proposed Order.
	Lodged proposed order granting preliminary injunction in part and dismissing complaint in part.
Oct. 6	14. Filed defendant's Notice of Appeal to the Supreme Court of the United States.
10	15. Filed plaintiff's Notice of Cross-Appeal to the Supreme Court of the United States.
11	Mailed Clerk's Notice to Parties of Record on Appeal to the Supreme Court of the United States.
12	Mailed Clerk's Notice to Parties of Record on Cross-Appeal to the Supreme Court of the United States.
18	Filed Order Granting in Part preliminary injunction. (No. 72-1045)
24	16. Filed Designation of Record by California Bankers Association.
26	17. Filed Designation of Record by United States.
Nov. 8	Made and mailed Record on Appeal to Supreme Court of the United States by certified mail, receipt no. 224337.
13	18. Filed Notice of Appeal by defendants to The Supreme Court of the United States.
	Mailed Clerk's notice of filing Notice of Appeal to parties of record.
	Filed receipt from the Supreme Court of the United States for Record on Appeal (No. 72-1045-WTS)
15	Made and mailed First Supplemental Record on appeal to Supreme Court of the United States by certified mail, receipt no. 224338.
16	19. Filed Notice of Cross-Appeal to the Supreme Court from the Order of October 18, 1972 by plaintiff, The California Bankers Association.
Nov. 17	Made and mailed Clerk's Notice of Filing Notice of Appeal to Parties of Record.

DATE 1972	PROCEEDINGS
20	Filed receipt from the Supreme Court of the United States for Supplemental Record on Appeal. (No. 72-1045)
29	Made and mailed Second Supplemental Record on Appeal to Supreme Court of the United States by certified mail, receipt no. 224339.
Dec. 5	Filed receipt from the [United States Supreme Court] for Second Supplemental Record on Appeal. (No. 72-1045).

Fortney H. Stark, Jr. et al vs. John B. Connally et al.

United States District Court
for the Northern District of California
No. C 72-1045 WTS

DATE 1972	PROCEEDINGS
June 7	1. Filed Complaint, issued Summons. (Request for Three Judge Court)
	2. Filed Order for Service Other Than U.S. Marshal.
	3. Filed Notice of Requirement of Three Judge Court. (File to Judge Sweigert).
June 9	4. Filed Order for Service Other than U.S. Marshal.
June 12	5. Filed Notice Re: Convening of Three Judge Court, (Judge Sweigert.)
June 26	6. Filed Order Convening Three Judge Court, consisting of Judges Oliver D. Hamlin, William T. Sweigert and William G. East. (chambers.)
	Made and mailed files to Hon. Oliver D. Hamlin, William T. Sweigert, and William T. East.
June 29	7. Filed Plaintiff's Memorandum of Points and Authorities re: Temporary Restraining Order. Copies mailed to Judge Hamlin and Judge East on June 29, 1972. (Judge Sweigert.)
29	Case No. C-72-1157 was consolidated with this case for the purpose of hearing temporary restraining order. After hearing, further hearing continued to June 30, 1972 at 4:00 p.m.
29	On this date certain documents were taken to Judge Sweigert's Chambers without being docketed and Distribution being made.
29	7a. Filed Affidavit of William Ehler.
	Mailed Affidavit of William Ehler to Judge East and Judge Hamlin, original copy in Chambers of Judge Sweigert.

DATE 1972	PROCEEDINGS
June 30	8. Filed Amended Verification by Charles C. Marson. Mailed copies to Judge East and Judge Hamlin, June 30, 1972—(Judge Sweigert)
	9. Filed Memorandum of Decision on Application for Temporary Restraining Order. Mailed copies to Judge Hamlin and Judge East.
June 29	10. Filed Application for Temporary Restraining Order.
	11. Filed Opposition to Application for Temporary Restraining Order.
July 7	12. Filed Notice of Motion and Motion for Preliminary Injunction, noticed for July 17, 1972, at 10:00 a.m.
	13. Filed Notice of Motion and Motion for Order Extending Time—Temporary Restraining Order, noticed for July 17, 1972 at 10:00 a.m.
	14. Filed Notice of Motion and Motion for Preliminary Injunction, noticed for July 17, 1972, at 10:00 a.m.
	15. Filed plaintiff's Opening Memorandum of Points and Authorities Re: Preliminary Injunction. Copies of [docket entries] of 12, 13, 14 and 15 above were forwarded to Judge Hamlin and Judge East.
	16. Filed Stipulation Extending Time for Plaintiffs to File Evidentiary Papers and Briefs Concerning Plaintiffs' Motion for Preliminary Injunction to and including July 7, 1972.
	17. Filed Notice of Errata in re: Plaintiffs' Memorandum of Points and Authorities, etc. (for specifics, see the file.)
	18. Filed Supplementary Affidavit of Jay A. Miller in Support of Plaintiffs' Motion for Preliminary Injunction.
	19. Filed Affidavit of Alfred R. Davies in Support of Plaintiffs' Motion for Preliminary Injunction. Mailed copies of documents re 16, 17, 18, and 19 above to Judge Hamlin and Judge East on July 11, 1972.

DATE 1972	PROCEEDINGS
July 13	20. Filed Motion to Dismiss by the defendants.
	21. Filed Memorandum in Support of defendants' Motion to Dismiss and Opposition to Motions for Preliminary Injunction.
	22. Filed Opposition to Motions for Preliminary Injunctions by the defendants.
	23. Filed Notice of Motion to Dismiss Action, scheduled for July 17, 1972 at 10:00 a.m.
	24. Filed Order Shortening Time for Hearing Defendants' Motion to Dismiss, July 17, 1972 at 10:00 a.m. Mailed copies of documents 22, 23, and 24 to Judge East and Judge Hamlin on July 14, 1972 (Judge Sweigert.)
July 17	25. Filed Plaintiffs' Reply Memorandum Re: Preliminary Injunction.
	26. Filed Rejoinder Memorandum in Support of Preliminary Injunction and in Reply to Motion to Dismiss.
	27. Filed Order Shortening Time for Hearing Motion to Amend Complaint.
	28. Filed Notice of Motion for Leave to Amend Complaint by Adding Plaintiffs.
	Three Judge Hearing, Plaintiffs' Motion to Amend Complaint by adding more parties granted, Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss submitted; Motion to Extend (Hamlin, Sweigert and East) Temporary Restraining Order Pending Decision granted.
July 20	29. Filed Plaintiffs' [Supplementary] Memorandum Re: Preliminary Injunction.
Sept. 11	30. Filed Memorandum of Decision (Judge Sweigert and Judge East, with Judge Hamlin dissenting and concurring).
Sept. 21	31. Filed Notice of Lodging of Proposed Order.
	Lodged proposed order granting preliminary injunction in part and dismissing complaint in part.
Oct. 6	32. Filed defendants' Notice of Appeal to the Supreme Court of the United States.
Oct. 11	Mailed Clerk's Notice of Appeal to the Supreme Court of the United States to parties of record.
	33. Filed Plaintiffs' Notice of Cross-Appeal to the Supreme Court of the United States.

DATE 1972	PROCEEDINGS
Oct. 12	Mailed Clerk's Notice to parties of record on Plaintiffs' Notice of Cross Appeal to the Supreme Court of the United States.
Oct. 18	34. Filed Order Granting in Part Preliminary Injunction (Judge Sweigert)
Nov. 8	Made and mailed record on appeal to Supreme Court of the United States by certified mail receipt no. 224337.
Nov. 13	35. Filed Notice of Appeal by defendants to Supreme Court of the United States.
	Mailed Clerk's Notice of Filing Appeal to parties of record.
	36. Filed receipt from the Supreme Court of the United States for record on appeal.
Nov. 15	Made and mailed First Supplemental Record on Appeal to Supreme Court of the United States by certified mail, receipt no. 224338.
Nov. 20	37. Filed receipt from the Supreme Court of the United States for first supplemental record on appeal.
Nov. 17	38. Filed Notice of Cross-Appeal to the Supreme Court of the United States by plaintiffs.
Nov. 27	Mailed Clerk's Notice of Filing Cross-Appeal to parties of record.
Nov. 29	Made and mailed Second Supplemental Record on Appeal to Supreme Court of the United States by certified mail receipt no. 224339.
Dec. 5	39. Filed receipt from the Supreme Court of the United States for Second Supplemental Record on Appeal.
1973	
Jan. 16	40. Filed Letter to Mr. Marson re: application for extension of time for docketing an appeal from Michael Rodak, Jr., Esq., Clerk of the Supreme Court of the United States.
Feb. 9	41. Filed copy of letter from Michael Rodak, Jr., Clerk of the Supreme Court of the United States to Charles C. Marson stating, "Your application for a further extension of time in which to docket an appeal in the above entitled case has been presented to Mr. Justice Douglas who, on February 5, 1973, signed an order extending your time to and including March 2, 1973."

Filed Jul 22, 1972

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
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San Francisco, California 94104
Telephone: (415) 362-5808

Attorneys for Plaintiff,
The California Bankers Association

United States District Court
For the Northern District of California

No. 72-1157 WTS

The California Bankers Association,
Plaintiff,

v.

John B. Connally, Jr., Secretary of the Treasury of the United States; George P. Shultz, Secretary-Designate of the Treasury; William B. Camp, Comptroller of the Currency; Myles J. Ambrose, Commissioner of Customs; Johnnie M. Walters, Commissioner of the Internal Revenue Service; Herman Nickerson, Jr., Administrator of the National Credit Union; The Board of Governors of the Federal Reserve System; the Federal Home Loan Bank Board; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission,
Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Jurisdiction and Venue

1. This is an action for injunctive and declaratory relief to prevent enforcement of an Act of Congress and regulations promulgated pursuant to that Act. This Court has jurisdiction under 5 U.S.C. 500 et. seq.; 5 U.S.C. 701-706; and 28 U.S.C. 1331, 1332, 1346, 1348, 1349, 1361, 2201, and 2282. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. Each of the defendants has performed or threatens to perform the acts alleged in this complaint within the Northern District of California, and the plaintiff's claim arises in this District. Pursuant to 28 U.S.C. 1391, venue is proper in this District.

Parties

3. The plaintiff, California Bankers Association, is an unincorporated association consisting of 158 state and national banks doing business in the State of California. The member banks of the plaintiff are referred to as "the members." Each member maintains many thousands of accounts and is involved in numerous transactions daily which fall within the provisions of the Act of Congress and regulations under attack herein. If such Act and regulations are permitted to become effective, compliance by the members will cost them many thousands of dollars per year and inflict upon them the irreparable injury hereafter described. Alternatively, failure of members to comply with the Act and regulations will subject them to substantial civil and criminal penalties.

4. Defendant John B. Connally, Jr., is the Secretary of the Treasury of the United States, and is referred to

in this complaint as "the Secretary." Defendant Charles Shultz has been nominated Secretary of the Treasury, subject to confirmation by the United States Senate. Defendants Connally and Shultz are charged with the duty and responsibility of enforcing the Act and regulations which are the subject of this complaint.

5. Defendant William B. Camp is Comptroller of the Currency; defendant Myles J. Ambrose is Commissioner of Customs; defendant Johnnie M. Walters is Commissioner of the Internal Revenue Service; defendant Herman Nickerson, Jr., is Administrator of the National Credit Union. Defendants Camp, Ambrose, Walters, Nickerson, and the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission are charged under the Act and regulations with the duty and responsibility of enforcing the Act and regulations in question.

Claim for Relief

6. In 1970 the Congress of the United States enacted and the President of the United States signed into law Public Law 91-508, 84 Stat. 114 *et seq.*, 31 U.S.C. § 1051 *et seq.*, referred to in this complaint as "the Act."

7. In April, 1971, purportedly pursuant to the authority granted to him by the Act, the Secretary of the Treasury promulgated certain regulations adding Part 103 to the Code of Federal Regulations, referred to hereinafter as "the regulations." These regulations are, unless otherwise enjoined, to become effective July 1, 1972.

8. The Act and regulations require that the plaintiff's members affirmatively and promptly report to the Secretary, in addition to other transactions, the following:

a) The transportation by plaintiff's members of monetary instruments having a value of more than $5,000.00 into or out of the United States;

b) Each deposit, withdrawal, exchange of currency or other payment by, through, or to one of plaintiff's members which involves a transaction in currency of more than $10,000; except that the members are not required to report transactions with an established customer which it reasonably concludes does not exceed in its currency transactions amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.

9. The Act and regulations further require that the members retain either the original or a microfilm or other copy or reproduction of each of the following:

a) The front and back of all checks and money orders drawn on it; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criteria are exempt;

b) Records of each transaction involving a checking or savings account;

c) Records of each extension of credit of more than $5,000 not secured by real property;

d) Records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

10. The reporting and record keeping requirements under the Act and regulations may be modified or expanded

at the will of the Secretary under C.F.R. 103445(a), which provides, in part, as follows:

> "The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions."

The aforesaid discretionary power to modify or expand the requirements threatens to deprive members of their constitutional right of due process and equal protection under the Fifth Amendment of the United States Constitution and is a void delegation of legislative power and/or an excessive exercise of legislative power previously delegated in contravention of Article I of the United States Constitution. The foregoing regulation likewise purports to authorize the Secretary to modify or expand the regulations without complying with the procedure specified by the Administrative Procedure Act (5 U.S.C. 500 *et. seq.*)

11. Each member maintains a close business relationship with its depositors and customers which is founded upon the member maintaining the confidential nature of its depositors' and customers' business transactions. Compliance with the provisions of the Act and regulations described herein will prevent members from maintaining such confidence thereby destroying the business relationship that exists. The destruction of such business relationship will cause members to sustain irreparable injury by virtue of losing significant numbers of customers and depositors as well as losing the good will and confidence essential to the operation of a bank. Such injury will de-

prive members of their property without due process of law and denies members the equal protection of the laws guaranteed to them under the Fifth Amendment to the United States Constitution.

12. If the Act and regulations are permitted to become effective, members will be forced to act as agents of and co-conspirators with defendants for the purpose of: (a) illegally violating depositors' and customers' right of privacy; (b) abridging depositors' and customers' freedom of speech and assembly as guaranteed by the First Amendment of the United States Constitution; (c) engaging in unreasonable searches and seizures in contravention of the Fourth Amendment to the United States Constitution; and (d) depriving depositors and customers of the due process of laws, equal protection of the laws and abridging their privileges and immunities in violation of the Fifth and Fourteenth Amendments of the United States Constitution. As a direct and proximate result, members will be exposing themselves to potential liability from such depositors and customers thereby depriving members of their property without due process of laws and denying them the equal protection of the laws as guaranteed by the Fifth Amendment of the United States Constitution.

13. A number of customers and depositors of members are religious, political and controversial entities or members of such entities to whom the freedom of speech and association is protected under the First Amendment. Such customers and depositors are often the targets of official surveillance because of the unorthodoxy of their beliefs. Disclosure of the information called for by the Act and regulations is a method of implementing such surveillance. Members are illegally being required by the scheme of governmental surveillance encompassed within the Act and

regulations to be the perpetrators of illegal searches and seizures as well as a co-conspirator with the government in supressing the freedom of speech and assembly and the civil rights of such customers and depositors.

14. The plaintiff's members have no plain, speedy or adequate remedy at law. If this Court does not enjoin defendants as hereinafter prayed, the plaintiff and the members will immediately and irreparably suffer injury as alleged.

15. An actual controversy exists between the plaintiff and the defendants. The plaintiff believes and alleges that the Act and regulations are unconstitutional, null and void in their entirety in that they violate Article I and the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution. At the same time, the plaintiff is informed and believes, and, based upon such information and belief, alleges that defendants contend that the Act and regulations are legal and constitutional in all respects.

WHEREFORE, the plaintiff prays that this court:

1. Issue preliminary and permanent injunctions enjoining and preventing defendants and their agents, servants, employees, representatives and successors from enforcing any of the provisions of the Act and regulations in dispute herein;

2. Issue a declaratory judgment declaring the Act and regulations in dispute herein unconstitutional, null and void in their entirety as being repugnant to Article I and the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

3. Grant plaintiff its costs of suit; and

4. Grant such other and further relief as may be just and proper.

Dated: June 22, 1972.

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
By Philip E. Diamond
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title omitted in printing]

NOTICE OF RELATED CASES

Notice is hereby given, pursuant to Rule 101 of the Local Rules of Practice of the United States District Court for the Northern District of California, that the above entitled action is related to another case, also filed with this court, to wit: FORTNEY H. STARK, JR., ET AL., v. JOHN B. CONNALLY, JR., ET AL, No C-72-1045 WTS, filed on June 7, 1972.

Both cases involve the same defendants and relate to the unconstitutionality of Public Law 91-508, 84 Stat. 1114 *et. seq.*, and the invalidity of regulations adopted pursuant thereto. Both actions seek to enjoin enforcement of such regulations and pray for a declaration that Public Law

91-508 and the regulations adopted pursuant thereto are unconstitutional and invalid.

Dated: June 22, 1972.

Philip E. Diamond
John M. Anderson
Landels, Ripley & Diamond

By Philip E. Diamond
Attorneys for Plaintiff

Original Filed—Jun 29 1972
Clerk, U. S. Dist. Court, San Francisco

United States District Court
For the Northern District of California

[Title omitted in printing]

No. 72-1157 WTS

MOTION FOR TEMPORARY RESTRAINING ORDER

Based on the complaint, the accompanying affidavit of Robert H. Fabian and the accompanying memorandum of points and authorities, the plaintiff moves the Court as follows:

To issue a temporary restraining order suspending and restraining the operation, enforcement, or execution of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 1051-1122 (1972) and the regulations promulgated thereunder, 31 C.F.R. § 103.11-49 (1972) pending a hearing upon the issuance of the preliminary injunction sought in this case.

This motion and the complaint are based on the contentions that:

1. 31 U.S.C. § 1051-1122((1972) is unconstitutional.

2. The Secretary of the Treasury, unless enjoined, threatens to enforce the foregoing Act of Congress and the regulations he has promulgated thereunder;

3. Unless the operation and enforcement of the foregoing Act and regulations are restrained pending a hearing upon the issuance of the preliminary injunction sought in this case, injury to plaintiff's members in the interim will be irreparable, even by final judgment in plaintiff's favor; and

4. No injury will be sustained by the government through issuance of a temporary injunction.

Dated: June 28, 1972.

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
Attorneys for Plaintiff,
The California Bankers Association

By s/JOHN M. ANDERSON
John M. Anderson
3300 Crocker Plaza
San Francisco, California 94104

United States District Court
For the Northern District of California

[Title omitted in printing]

No. C-72-1157 WTS

AFFIDAVIT OF ROBERT H. FABIAN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

State of California
County of San Francisco—ss:

Robert H. Fabian, being first duly sworn, states:

1. I am Senior Vice President and General Counsel of the Bank of America, N.T. & S.A. and Vice-Chairman of the Government Affairs Division of the California Bankers Association. The Bank of America is a member bank of the California Bankers Association (the "CBA"), a non-profit corporation comprising 158 state and national banks

doing business in the State of California. The member banks of the CBA are referred to in this affidavit as "the members."

The Act

2. In May, 1970, the Congress of the United States enacted and the President signed into law the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 1051-1122 (Supp. 1972) referred to in this affidavit as "the Act."

The Regulation

3. In March, 1972, the Secretary of the Treasury promulgated certain regulations in alleged accord with the Act. These regulations (referred to in this affidavit as "the regulations") are set forth at 31 C.F.R. § 103.11-103.51 (1972). They are due to become effective July 1, 1972.

Currency Transactions

5. The regulations require, *inter alia,* that all banks, including the CBA's members, affirmatively and promptly report to the Secretary of the Treasury each deposit, withdrawal, exchange of currency, or other payment by, through, or to one of the plaintiff's members which involves a transaction in currency of more than $10,000. (The CBA's members are not, however, to report a transaction with an established customer which it reasonably concludes does not exceed its currency transaction amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.) See 31 C.R.F. § 103.22 (1972).

6. Compliance with the foregoing regulation would constitute a complete breach and abandonment of the members' confidential and fiduciary relationships with its de-

positors; and the expenditure of additional sums of money for administration, wages, and record keeping equipment and material.

Record Keeping

7. The Act and regulations further require that members retain either the original or microfilm or other copy or reproduction of the front and back of all checks and money orders drawn on the member banks; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criterion. See 31 C.F.R. § 103.33 (1972).

8. Compliance with the foregoing regulation could require members to completely breach their fiduciary and confidential relationship with their depositors; to make involuntary disclosures of the details of their depositors' accounts; and to expend substantial sums of money in payment for copying equipment and materials, storage facilities, wages, and other administrative costs.

9. The regulations further require that the members retain either the original or a microfilm or other copy or reproduction of the records of each transaction involving a checking or savings account; the records of each extension of credit of more than $5,000 not secured by real property; and records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

10. Compliance with the foregoing regulation could wholly disrupt the members' confidential and fiduciary relations with long-standing depositors and entail the ex-

penditure of substantial additional sums of money by each member for recording equipment, storage facilities, wages, and attendant bookkeeping.

Secretary's Discretion

11. The reporting and record bookkeeping requirements described above are subject to modification by the Secretary of the Treasury in accord with 31 C.F.R. § 103.45 which provides in part:

> "The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions."

The foregoing regulation threatens to deprive the members of their Constitutional right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

Bank-Depositor Relationship

12. Each of the members maintains a close business relationship with its depositors. That relationship is founded upon the members' maintaining the trust and confidence of their depositors. Compliance with the regulations described above will prevent the members from maintaining that confidence and substantially impair their relationship with their depositors. The impairment of that relationship will cause members to sustain irreparable injury in that they will lose significant numbers of customers and deposi-

tors as well as the good will and confidence essential to the operation of a bank.

13. I am informed and believe and on that basis state that if the regulations described above are enforced, the members' depositors will seek and find alternate means to conduct their business transactions, free from the scrutiny and surveillance of the Federal government.

14. If the regulations described above are permitted to become effective, the members will be forced to act as agents of and co-conspirators with defendants for the purpose of illegally violating their depositors' right of privacy; and abridging their depositors' freedom of speech and assembly as guaranteed by the First Amendment of the United States Constitution. The reporting requirement set forth in 31 C.F.R. 103.22 (1972) and implied in 103.31-37 (1972) constitutes an unreasonable search and seizure in contravention of the Fourth Amendment to the United States Constitution, and will deprive depositors of due process of law and equal protection of the law, as well as abridging their privileges and immunities in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

15. As a direct and proximate result of the foregoing, the members will be exposing themselves to potential liability from their depositors.

16. A number of depositors of the members are religious, political and socially controversial entities to which freedom of speech and association are protected under the First Amendment. Such depositors are often the targets of official surveillance because of the unorthodoxy of their beliefs. Disclosure of the information called for by the Act and the regulations is a method of implementing such surveillance. Members are illegally being required by the

scheme of governmental surveillance encompassed within the regulations to be the perpetrators of illegal searches and seizures as well as co-conspirators with the Government in supressing the freedom of speech and assembly and civil rights of their depositors.

17. By reason of the foregoing and on behalf of the California Bankers Association, I respectfully pray an order of this Court temporarily restraining the operation and enforcement of the Act and those regulations promulgated by the Secretary of the Treasury and set forth at 31 C.F.R. § 103.11-51 (1972).

At San Francisco, California, this 29th day of June, 1972.

s/ ROBERT H. FABIAN
Robert H. Fabian

Subscribed and sworn to before
me this 29th day of June, 1972

s/ DIANE C. CERDENA
Notary Public
for the County of
San Francisco

June 29

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
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of Northern California, Inc.
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Attorneys for Plaintiffs

United States District Court
Northern District of California

CIVIL NO. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,
vs.
John B. Connally, Jr., et al.,
Defendants.

City and County of San Francisco } ss
State of California }

AFFIDAVIT OF WILLIAM EHLER

WILLIAM EHLER, being sworn, deposes and says:

1. I am the Assistant Chief Analyst of, and an officer of, the Bank of America National Trust and Savings

Association, and am employed at its World Headquarters in San Francisco.

2. Recently it has been part of my employment responsibility to calculate the cost to my employer of implementing the Bank Secrecy Act and its Regulations, which are the subject of this action.

3. I have calculated that the first year's cost to my employer of implementing that Act and those Regulations will be $392,631.84. This cost includes equipment, maintenance, salaries, consumable supplies, interest on investments, and insurance. This cost does not include time and effort in responding to demands for information from law enforcement or the Department of the Treasury.

4. The above is true of my own personal knowledge, and if sworn as a witness I could testify competently thereto.

.....

William Ehler

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Civil No. C-72-1045-WTS

[Title omitted in printing]

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff hereby apply under 28 U.S.C. 2284, for a Temporary Restraining Order, to be issued forthwith, restraining Defendants, their officers, agents, servants, employees, attorneys and those persons in active concern or participation with them who receive actual notice of the Temporary Restraining Order from enforcing, directly or indirectly, any of the provisions of Public Law 91-108 or any of the provisions of 31 CFR Part 103, as that Part is to become

effective on July 1, 1972. The grounds for this Application are set forth in the accompanying Memorandum and Affidavits on file herein and upon all the pleadings and papers on file herein.

Dated: June 29, 1972

Respectfully submitted,

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
Attorneys for Plaintiffs

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United States District Court
Northern District of California
Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,
vs.
John B. Connally, Jr., et al.,
Defendants.

City of Walnut Creek
County of Contra Costa—ss

AFFIDAVIT OF THOMAS A. STARK

Thomas A. Stark, being sworn, deposes and says:

1. I am the General Counsel of the Security National Bank, a plaintiff in this action, and have been so employed since 1966. I am familiar with the subject matter of this action and with the Act of Congress and Regulations involved herein.

2. Since the Security National Bank became a plaintiff in this action many of its customers have indicated approval of its action, concern for the privacy of their accounts, and interest in protecting those accounts from surveillance by the government. In my opinion compliance with the Act and Regulations at issue in this action will cause our bank to lose a substantial of customer confidence, customers, and deposits.

3. I am aware that under the Act and Regulations at issue herein our bank may be ordered to comply with said Regulations and various orders issued thereunder. I am also aware that refusal to comply with said regulations and orders will expose our bank and its personnel to the immediate imposition of civil and criminal sanctions.

4. I am in doubt about the meaning and proper interpretation of some of the Regulations and am uncertain as to the duties of our bank in complying with them. This uncertainty is especially acute with respect to our duty to report large cash transactions of some customers but not all, since we are to exclude those transactions made in the "customary conduct of the business" of an "established customer" as described in 31 CFR 103.22.

5. In the recent past our bank advertised in its market area that United States Series E Bonds are not as good an investment as other available investments carrying the full faith and credit of the United States: *i.e.*, time deposits in banks and savings and loan companies. In apparent retribution, the Department of the Treasury cancelled our right to deal in Series E Bonds. To my knowledge our bank is the only insured bank in the United States whose authorization to sell such bonds has been cancelled. We believe as a result of this incident that we are an unpopular bank in the eyes of the Department of the Treasury, and thus more

likely than an ordinary bank to be faced with sanctions under the Act and Regulations at issue herein.

6. The foregoing is true of my own knowledge, and if sworn as a witness I could testify competently thereto.

Executed this 29th day of June, 1972, at Walnut Creek, California.

/s/ THOMAS A. STARK
Thomas A. Stark

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,
vs.
John B. Connally, Jr., et al.,
Defendants.

State of California
City and County of San Francisco—ss

AFFIDAVIT OF CHARLES C. MARSON

Charles C. Marson, being sworn, declares and says:

1. I am the Legal Director of the American Civil Liberties Union Foundation of Northern California, Inc.

2. I am a plaintiff in this action and the holder of a demand deposit account in the Bank of America National Trust and Savings Association in San Francisco.

3. I am gravely concerned lest the implementation of Public Law 91-508 and its accompanying Regulations will invade the privacy of my bank account, expose my personal financial affairs to unlawful scrutiny, and expose my political memberships and affiliations to the knowledge of the government.

4. The above facts are within my personal knowledge and if sworn as a witness I could testify competently thereto.

CHARLES C. MARSON

[Seal]

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,

vs.

John B. Connally, Jr., et al.,
Defendants.

City and County of San Francisco
State of California—ss

AFFIDAVIT OF JAY A. MILLER

Jay A. Miller, being sworn, declares and says:

1. I am the Executive Director of the plaintiff American Civil Liberties Union of Northern California, Inc. (ACLUNC), and a member of its Board of Directors. From

1965 to June 1971, I was the Executive Director of the Illinois Division of the ACLU.

2. As part of my duties in my position with ACLUNC I seek out, meet with, and speak to many persons who are members of or critics of ACLUNC. I am aware of great reluctance upon the part of a substantial number of members of and contributors to ACLUNC to have their affiliation with ACLUNC learned by employers, government, and the public at large.

3. I am aware that the American Civil Liberties Union and its affiliates have historically been targets for retaliation on the part of some of those who regard the organization and its members as dissident and dangerous.

4. Our surveys indicate that 1% of our members are in the armed forces; 2% in the aerospace industry; 31% in education; and 10% in local, state, or federal government jobs.

5. The above facts are within my personal knowledge and if sworn as a witness I could testify competently thereto.

JAY A. MILLER

[Seal]

James L. Browning, Jr.
United States Attorney

John M. Youngquist
Assistant United States Attorney
Chief, Tax Division
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450 Golden Gate Avenue—Box 36055
San Francisco, California 94102
Telephone: 556-3213
Attorneys for Defendants

In the United States District Court for the Northern District of California

Original Filed—Jun 29 1972
Clerk, U. S. Dist. Court
San Francisco

Fortney H. Stark, Jr., et al., *Plaintiffs*, v. John B. Connally, Jr., etc., et al., *Defendants.*	NO. C-72-1045-WTS
The California Bankers Association, *Plaintiff*, v. John B. Connally, Jr., etc., et al., *Defendants.*	NO. C-72-1157-WTS

OPPOSITION TO APPLICATIONS FOR TEMPORARY RESTRAINING ORDERS

The undersigned attorneys hereby specially enter their appearance for the named defendant officers and agencies of the United States of America in each of the above-

entitled actions which have heretofore been filed, docketed and designated in this Court as related civil actions, but which have not been consolidated for hearing. This appearance is made at this time solely to oppose the issuance of any temporary restraining order or orders in these actions, which, it has been informally announced, will be applied for by the various plaintiffs before this Court at 4:00 P.M. on Thursday, June 29, 1972, in Courtroom No. 1, Honorable William T. Sweigert presiding.

This written opposition is being prepared at 1:30 P.M., Thursday, June 29, 1972, for the reason that no application or motion papers in either case were served upon the undersigned attorneys for the defendants until approximately 11:30 A.M. on said date, although the attorneys for the plaintiffs in each action have well known for at least three weeks that the office of the United States Attorney for the Northern District of California would represent the defendants in these actions. As of the time of preparation of this opposition, the undersigned attorneys have still not been served with any application or motion or affidavits re any requested temporary restraining order in No. C-72-1045-WTS; they were served at approximately 10:00 A.M. this date with a 54-page, unindexed "Plaintiffs' Memorandum of Points and Authorities Re: Temporary Restraining Order" in said action. Accordingly, defendants have been, it is submitted, intentionally given no timely opportunity to examine and counter any affidavits presumably to be submitted to the Court to establish some factual record on the statutory question of "irreparable damage." 28 U.S.C. § 2284(3).

In action No. C-72-1157-WTS, the undersigned attorneys were served with motion papers, memorandum and one affidavit in support of a requested temporary restraining

order at 11:30 A.M. on this date, likewise giving defendants no timely opportunity to counter whatever showing as to "irreparable damage" said affidavit purports to establish.

The foregoing is expressed to the Court as relevant to this opposition for the reason that the Court's record shows the following chronology:

(a) The complaint in No. C-72-1045-WTS was filed on *June 7, 1972;* summons was issued thereon and a notice of requirement of three-judge court was filed on the same date; the United States Attorney was served with said process on *June 9, 1972.*

(b) On *June 12, 1972,* the Court issued its "Notice Re Convening of Three Judge Court (28 U.S.C. Sec. 2284)" to the Chief Judge of the United States Court of Appeals for the Ninth Circuit in said action, stating therein that: "A temporary restraining order has not been applied for. No application has yet been made for Preliminary Injunction."

(c) The complaint in No. C-72-1157-WTS was filed on *June 22, 1972;* summons was issued on that date, and said process was served on the United States Attorney on *June 23, 1972.*

(d) No application for temporary restraining order was made at the time of filing of the complaint in said action, and no notice of requirement of a three-judge court has yet been filed in the case to the knowledge of the undersigned attorneys.

The foregoing demonstrates an unconscionable delay on the part of all plaintiffs in coming forward to claim "irreparable damage" and to request temporary restraining orders against the operation of duly-promulgated regulations under an Act of Congress in existence since October

1970 (P.L. 91-508, 84 Stat. 1118), which, as plaintiffs well know and allege, are to go into effect two days from today on July 1, 1972. These applications for restraining orders, it is submitted, are purely tactical, are founded upon no real "irreparable damage" at all, and have been made at the eleventh hour—over three weeks after filing of the complaint in the earliest case—in order to unfairly pressure the defendants and, more importantly, this Court into hasty and unnecessary, summary and temporary action to cloud the operation of valid regulations under a valid Act of Congress for an undetermined period prior to hearing by the three-judge court as required by 28 U.S.C. § 2284(3).

It is submitted that steps taken by plaintiffs here, solely in respect of these applications for temporary restraining orders, are ethically questionable, inequitable, and in specific violation of the letter and spirit of Rule 65(b) of the Federal Rules of Civil Procedure and of LR 117 of this Court. For these reasons alone, the applications should be denied.

Further grounds for denial of the restraining orders sought here are the following:

1. Such affidavits as have been submitted in behalf of plaintiffs are entirely insufficient to show the "irreparable damage" required for a temporary restraining order against the operation of a federal law under 28 U.S.C. § 2284 for the reason that all are based upon speculation as to imagined abuses of constitutional rights of persons, presumably by the Federal Government and its agents, which are by no means or articulation apparent or required on the face of the complained of regulations and statute. Until it is made evident that such abuses as are imagined by plaintiffs actually occur in the operation of the regulations and law no restraint against operation of the law as

intended by Congress should issue. Mere allegations of economic burden in required record-keeping are clearly insufficient to constitute "irreparable damage" under § 2284.

2. Plaintiffs apply for such broad restraints against the Government in these cases as would interfere with the proper use of recognized judicial and administrative process in production of records of financial institutions in pending federal investigations and cases entirely apart and independent of any requirements of the complained-of statute and regulations. Granting such temporary relief in these cases is clearly uncalled for in its disastrous effect of hampering proper Government use of process in criminal and civil proceedings that have been recognized for decades and thoroughly tested and approved by the courts of this Nation.

3. Plaintiffs have posted no security for costs and damages to the Government, required by Rule 65(c) F.R.Civ.P. for the issuance of any temporary restraining orders in these cases.

DATED: June 29, 1972.

Respectfully submitted,

/s/ JAMES L. BROWNING, JR.
James L. Browning, Jr.
United States Attorney

JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

United States District Court
Northern District of California

Filed Jun 30 1972
C. C. Evensen, Clerk

[Title omitted in printing]

MEMORANDUM OF DECISION ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs in the two above actions have applied for a temporary restraining order prohibiting defendants, the Secretary of the Treasury, and executive heads of certain other involved federal agencies, from enforcing the provisions of the new so-called Currency and Foreign Transactions and Reporting Act (31 U.S.C. Sec. 1051-1122; 12 U.S.C. Sec. 1829(b)); enacted by the Congress on October 26, 1970 to be effective May 1, 1971, and the Regulations issued thereunder (Title 31, Chap. 1, Part 103, Code of Federal Regulations Secs. 103.11-103.50), which Regulations were promulgated on March 31, 1972 but by their own terms were not to become effective until tomorrow, Saturday, July 1, 1972.

Plaintiffs include several named individual bank customers, the Security National Bank, the California Bankers Association, suing on behalf of all California banks, and the American Civil Liberties Union, suing on behalf of itself and its numerous member bank customers.[1]

Plaintiffs allege that the Act and the Regulations pose a threat of grave and irreparable injury to certain constitutional guarantees: freedom from unreasonable search and seizure; the so-called constitutional right to privacy; the

1. Questions of standing of certain plaintiff organizations to sue have not been considered at this stage of the proceedings.

privilege against self-incrimination; the requirement for due process as it may affect banks and bank customers; and the right of private association under the First Amendment.

Because these cases challenge the constitutionality of an Act of Congress and regulations promulgated thereunder, they are required by 28 U.S.C. Sec. 2284 to be heard and determined by a district court of three judges,[2] but under the provisions of Section 2284 the undersigned District Judge is empowered to grant a temporary restraining order to prevent irreparable injury until hearing and determination by the full court.

The stated purpose of the Act and the regulations promulgated thereunder is to require a certain kind of record-keeping by banks, financial institutions and specified persons and mandatory reporting by them of certain information therefrom, concerning otherwise private customer-bank transactions, to various federal agencies for the avowed reason that such records and reporting will have "a high degree of usefulness in criminal, tax and other regulatory investigations."

Notwithstanding the last minute lateness of plaintiffs' applications and without passing upon the extent, if any to which basic constitutional rights may be impaired by this new law, we are not at this point prepared to say that plaintiffs' claims, which have never been passed upon by any court, are insubstantial; on the other hand, neither the Government, which has, itself, already postponed implementation of this legislation for nearly two years since its enactment, nor the public interest, could possibly be injured

2. This Court has already arranged for assignment by the Chief Judge of the Circuit of two additional judges, Circuit Judge Oliver D. Hamlin and District Judge William G. East (District of Oregon).

by a mere further few weeks delay before requiring said banks, financial institutions and specified persons to comply with the reporting provisions of the Act and Regulations pending an opportunity for more adequate examination of plaintiffs' claims by the required three-judge court and a determination whether a preliminary injunction should be issued.

Any such temporary order in these actions, which for some reason have not been formally brought as representative class actions, would ordinarily be restricted to protection of the rights of the named individual plaintiffs in these two actions and the members of the named plaintiff organizations. However, geographical and mechanical problems presented by a statute of nation-wide applicability are such that fairness and orderliness will be served by imposing a temporary restraint without such limitation.

The Court finds, based upon the evidence submitted to this Court in the form of affidavits filed herein on behalf of plaintiffs, that the specified irreparable damage, as set forth therein, will result if this order is not granted.

For the foregoing reasons, a temporary restraining order is hereby issued accordingly:

It Is Hereby Ordered that defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this Order be, and they hereby are, restrained and enjoined from implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions and persons: specifically, Title 31, U.S.C. §§ 1081, 1082, 1083, 1101, and 1121, insofar as each of said sections requires, or authorizes the requirement of, reports; and 31 C.F.R., Part 103, Subpart B (§§ 103.21 through 103.26, inclusive) and Sub-

part D (§§ 103.41 through 103.50, inclusive), insofar as said Subparts and inclusive sections require, or authorize the requirement of, reports; and

It Is Further Ordered that nothing in this order shall be deemed to restrain or enjoin the implementation or enforcement of the Act and Regulations requiring the maintenance of certain records by banks, other financial institutions and persons: specifically, Title 12 U.S.C. § 1829b; and 31 C.F.R., Part 103, Subpart C (§§ 103.31 through 103.37); and

It Is Further Ordered that nothing in this order shall be deemed to restrain or enjoin the issuance or enforcement of any judicial or administrative process, authorized by existing law, requiring production of records required to be maintained under 12 U.S.C. § 1829b and 31 C.F.R., Part 103, Subpart C (§§ 103.31 through 103.37).

The foregoing order shall be subject to the power of the Court to modify this order, if necessary, for purposes of specificity.

This temporary restraining order shall be returnable upon application for a preliminary injunction on the 20th day of July, 1972 at 10 o'clock A.M., at the Courtroom of Department No. 1 of this Court, before the full three-judge court and upon a schedule for completion of the record by the parties as follows:

By plaintiffs, all evidentiary material relied on, together with briefs, to be served and filed by July 6, 1972; by defendants, all of same to be served and on file by July 13th; by plaintiffs, any properly rebuttal counter-affidavits or briefs to be served and filed by July 18, 1972. Dated: June 30, 1972.

/s/ W. T. Sweigert
W. T. Sweigert
United States District Judge

United States District Court
Northern District of California

Original
Filed
June 30 1972
Clerk, U. S. Dist. Court
San Francisco

No. 72 1157

The California Bankers Association,
Plaintiff,

vs.

JOHN B. CONNALLY, JR., et al.,
Defendants.

NOTICE RE CONVENING OF
THREE JUDGE COURT
(28 U.S.C. Sec. 2284)

It appearing to the court that the above-entitled action prays for an interlocutory and/or permanent injunction restraining the enforcement, operation and execution of an Act of Congress towit: Public Law 91-508, 84 Stat. 1114 et seq., and the regulations promulgated thereunder, upon the ground of unconstitutionality of said statute and that said action is one required by an Act of Congress, towit: Title 28 U.S.C. Sec. 2282, to be heard and determined by a district court of three judges;

Now, Therefore, as provided by Title 28 U.S.C. § 2285, the Chief Judge of the Ninth Circuit is hereby notified of such application.

A temporary restraining order has been granted, in part; and the hearing on application for preliminary injunction has been set for July 20, 1972, at 10 o'clock A.M.

Further, this action has been consolidated with *Stark v. Connally,* No. C 72 1045, in which a three judge court has already been appointed, composed of Judge Oliver D. Hamlin, Judge William G. East and the undersigned.

The Clerk of this Court shall forward this notice as required by Title 28 U.S.C. Sec. 2284.

Dated: June 30, 1972.

/s/ W. T. SWEIGERT
W. T. Sweigert
United States District Judge

Philip E. Diamond
John M. Anderson
Edgar B. Washburn

Landels, Ripley & Diamond
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Attorneys for Plaintiff,
The California Bankers Association

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Original Filed Jul 7 1972

Fortney H. Stark, Jr., *et al.*, *Plaintiffs,* v. John B. Connally, Jr., Secretary of the Treasury of the United States, *et al.*, *Defendants.*	No. 72-1045 WTS
The California Bankers Association, *Plaintiff,* v. John B. Connally, Jr., Secretary of the Treasury of the United States, *et al.*, *Defendants.*	No. 72-1157 WTS

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

To the parties of record in these cases and to their counsel:

Please take notice that on Monday, July 17, 1972, at 10:00 A.M., or as soon thereafter as the matter can be heard, the plaintiff, The California Bankers Association,

will move the Court for a preliminary injunction enjoining the defendants, their officers, agents, servants, employees, attorneys, and those persons acting in concert or participation with them, pending the final hearing and determination of this action, from implementing or enforcing the so-called Bank Secrecy Act, and specifically: Public Law 91-508, 84 Stat. 114, *et seq.*, on the grounds and for the reasons set forth in the affidavits filed in these consolidated cases on behalf of the plaintiffs, and in the accompanying memorandum of points and authorities.

Dated: July 6, 1972

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond

Attorneys for Plaintiff,
The California Bankers
Association

By s/JOHN M. ANDERSON
John M. Anderson
3300 Crocker Plaza
San Francisco, California 94104

(Certificate of service by mail omitted in printing)

United States District Court

For the Northern District of California

No. 72-1045 WTS—No. 72-1157 WTS

[Title omitted in printing]

AFFIDAVIT OF E. L. BROCKETT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of California
County of San Francisco—ss:

E. L. Brockett, being first duly sworn, states:

1. I am Assistant Vice President, California Division, of the Bank of America, N.T. & S.A., and have personal knowledge of the practice of the Bank of America in the making and retention of records.

2. Prior to July 1, 1972, the effective date of the Bank Secrecy Act, the Bank of America was not required to:

(a) Secure and maintain a record of the taxpayer identification number or a record of the Social Security number of its depositors or representative of its depositors, as now required by 31 C.F.R. § 103.34(a);

(b) Retain either the original or a microfilm or other copy of each check, clear draft, or money order drawn on the bank or issued and payable by it, as now required by 31 C.F.R. § 103.34(b)(3); or

(c) Copy both the front and back of those checks cleared by the bank, as now required by 31 C.F.R. § 103.36(a).

At San Francisco, California, this 6th day of July, 1972.

s/ E. L. Brockett
E. L. Brockett

Subscribed and sworn to before
me this 6th day of July, 1972.

s/ Lorraine Peterson

Notary Public

[illegible] County of San Francisco

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
3300 Crocker Plaza
San Francisco, California 94104
Telephone: (415) 362-5808

Attorneys for Plaintiff,
The California Bankers Association

United States District Court
for the Northern District of California

No. 72-1045 WTS—No. 72-1157 WTS

[Title omitted in printing]

AFFIDAVIT OF BREN LUTHI IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

State of California
County of San Francisco—ss:

Bren Luthi, being first duly sworn, states:

1. I am a TransityAnalyst for the Bank of America, N.T. & S.A., and am personally familiar with the numerical volume of checks cleared by the Bank of America each day.

2. The current daily average volume of checks processed by the Bank of America is approximately 5,538,000.

3. I am also generally familiar with the banking business in the State of California, and represent to the Court that it is generally understood and accepted that the Bank of America, N.T. & S.A., does approximately 40% of the banking business in the State of California.

At San Francisco, California this 6th day of July, 1972.

s/ BREN LUTHI
Bren Luthi

Subscribed and sworn to before
me this 6th day of July, 1972.

/s/ KATHLEEN A. HUNTER
Notary Public
for the County of San Francisco

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Original Filed Jul 7 1972
Clerk, U.S. Dist. Court
San Francisco

(Title omitted in printing)

NOTICE OF MOTION
AND MOTION FOR
ORDER EXTENDING
TEMPORARY RESTRAINING ORDER

To the parties of record in these cases and to their attorneys:

PLEASE TAKE NOTICE that on Monday, July117, 11972, at 10:00 a.m. or as soon thereafter as the matter can be heard, the plaintiff, The California Bankers Association, will move this Court for an order extending the temporary restraining order made by this Court on June 30, 1972, until such time as the Court rules on the plaintiffs' pending motions for a preliminary injunction.

The foregoing motion will be made and based upon the affidavits on file in the plaintiffs' behalf in these consolidated cases; and the memorandum of points and authorities filed in support of plaintiffs' motions for a temporary restraining order and for a preliminary injunction.

Dated: July 6, 1972

Philip E. Diamond
John M. Anderson
Edgar B. Washburn
Landels, Ripley & Diamond
Attorneys for Plaintiff,
The California Bankers
Association

By s/JOHN M. ANDERSON
John M. Anderson
3300 Crocker Plaza
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Henry Ramsey, Jr.
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Civil No. C-72-1045-WTS

Fortney H. Stark, Jr., et al.,
Plaintiffs,
vs.
John B. Connally, Jr., et al.,
Defendants.

State of California
City and County of San Francisco—ss.

SUPPLEMENTARY AFFIDAVIT OF JAY A. MILLER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Jay A. Miller, being sworn, declares and says:

1. The membership dues and financial contributions made to the plaintiff American Civil Liberties Union of

Northern California Inc. (hereinafter "ACLUNC") arrive occasionally in the form of money orders, but predominantly in the form of checks, drawn on banks from all over California, whose identities cannot be predicted in advance, occasionally drawn on banks in other states and, on at least one occasion, drawn on a bank in a foreign country.

2. The plaintiff ACLUNC, a California corporation, is affiliated with its parent organization, the American Civil Liberties Union, Inc. (hereinafter "ACLU"), a New York corporation, which maintains its bank account in the Chemical Bank of New York.

3. The current practice of ACLUNC is to coordinate membership drives and fundraising appeals with ACLU. The mechanics of this coordination result in the mailing of membership checks by members of ACLUNC in Northern California either to the San Francisco office of ACLUNC or to ACLU in New York, where the checks received directly from members and contributors are cashed, and appropriate monies remitted to ACLUNC.

4. The above is within my own knowledge and if sworn as a witness I could testify competently thereto.

JAY A. MILLER

Subscribed and sworn to before me this 6th day of July, 1972.

PAMELA S. FORD—Notary Public

[Seal]

Henry Ramsey, Jr.
Charles C. Marson
Peter Sheehan
American Civil Liberties Union Foundation
of Northern California, Inc.
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Civil No. C-72-1045-WTS

[Title omitted in printing]

State of California
County of Contra Costa—ss.

AFFIDAVIT OF ALFRED P. DAVIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Alfred P. Davies, being sworn, deposes and says:

1. I am the Senior Vice President of the plaintiff Security National Bank (hereinafter "the Bank"), and am concerned with implementing the recordkeeping requirements

of Public Law 91-508 and its Regulations (hereinafter "the Act and Regulations").

2. Before the effective date of the Act and Regulations, it was, and but for the Act and Regulations it would still be, the business policy and practice of the Bank:

a) to open a checking account without demanding from the customer a Social Security or Taxpayer Identification number;

b) to maintain records of loans not involving installment payments (such as commercial ninety-day notes) but involving the extension of credit for more than five thousand dollars, unsecured by real property, only for a short time after the transactions were closed. Such records were not retained substantially longer than one year.

c) to maintain no records of advice, request or instruction concerning the transfer of funds or currency outside the United States involving more than $10,000, as now required to be kept by 31 C.F.R. § 103.33(e).

3. The foregoing is true of my own knowledge, and if sworn as a witness I could testify competently thereto.

/s/ Alfred P. Davies
Alfred P. Davies

CORPORATE ACKNOWLEDGMENT

[Seal]
State of California
County of Contra Costa—ss.

On this 6th day of July, 1972, before me, Gina Capers, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Alfred P. Davies, known to me to be the Senior Vice President, of the corporation that executed the within instrument, and known to me to be the persons who executed the

within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal.

/s/ GINA CAPERS
Notary Public in and for said
County and State.

James L. Browning, Jr.
United States Attorney
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division
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450 Golden Gate Avenue—Box 35055
San Francisco, California 94102
Telephone: 556-3213

John J. McCarthy
Attorneys for Defendants

In the United States District Court for the Northern District of California

Original—Filed Jul 13 1972
Clerk, U. S. Dist. Court San Francisco

Fortney H. Stark, Jr., et al., *Plaintiffs* v. John B. Connally, Jr., etc., et al., *Defendants*	No. C-72-1045-WTS
The California Bankers Association, *Plaintiff* v. John B. Connally, Jr., etc., et al., *Defendants*	No. C-72-1157-WTS

MOTION TO DISMISS

Now come the defendants, by their attorneys, and do move the Court to dismiss the above-entitled actions on the following grounds:

1. The plaintiffs have not stated claims upon which relief can be granted;

2. The plaintiffs have no standing to maintain the instant lawsuits; and

3. These suits are in substance unconsented suits against the sovereign and, therefore, under the principle of sovereign immunity the Court has no jurisdiction over the United States and its agents in these proceedings.

Jul 13 1972

/s/ JAMES L. BROWNING, JR.
James L. Browning, Jr.
United States Attorney

/s/ JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

/s/ JOHN J. MCCARTHY
John J. McCarthy
Chief, General Litigation Section
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John J. McCarthy
Attorneys for Defendants

United States District Court
Northern District of California

NO. C-72-1045—WTS
NO. C-72-1157—WTS

[Title omitted in printing]

OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTIONS

Now come the defendants, by their attorneys, and do oppose the plaintiffs' motions for preliminary injunctions in these two proceedings on the following grounds:

1. The plaintiffs have not stated a claim upon which relief can be granted in that they have not and cannot demonstrate any legally recognized right which the statute under attack and the regulations promulgated thereunder would violate or infringe. Insofar as the non-banking plaintiffs are concerned, under presently existing laws, apart and separate from the statute under attack, the Federal Government can inspect any bank records which pertain to said non-banking plaintiffs; and no recognized privilege nor the Fourth nor Fifth Amendments to the Constitution prohibit any such reasonable inspection of records by the Government. *Donaldson v. United States,* 400 U.S. 517, 522 (1971); *Harris v. United States,* 413 F. 2d 316 (C.A. 9, 1969); *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969); *Galbraith v. United States,* 387 F. 2d 617 (C.A. 10, 1968); *United States v. Gross,* 416 F. 2d 1205 (C.A. 8, 1969), certiorari denied 397 U.S. 1013 (1970); *DeMasters v. Arend,* 313 F. 2d 79 (C.A. 9, 1963); *Application of Cole,* 342 F. 2d 5 (C.A. 2, 1965), certiorari denied 381 U.S. 950 (1965). With respect to the banking plaintiffs, it is clear that under existing law the Federal Government acting in an area properly subject to federal legislative

jurisdiction can require a person or bank to keep records, as does the statute under attack. *Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. Falsone*, 205 F. 2d 734, 739 (C.A. 5, 1953); *see: United States v. Bouschor*, 200 F. Supp. 541, 542 (Minn., 1961), affirmed 316 F. 2d 451 (C.A. 8, 1963); 26 U.S.C., Section 6001.

2. The plaintiffs have no standing as a matter of law to maintain the instant lawsuits and thus have no standing to obtain preliminary injunctions in that they cannot specify any legally recognized right which would be violated if the statute and regulations in question were enforced, and hence they can point to no legal injury flowing from the enforcement of said statute and regulations.

3. No preliminary injunction should be entered as the plaintiffs cannot demonstrate any reasonable probability of success in maintaining the instant lawsuits.

4. The plaintiffs are not entitled to the entry of preliminary injunctions as they cannot demonstrate that they will suffer any irreparable harm if preliminary injunctions are not granted. In an affidavit executed by William Ehler and filed by counsel for the plaintiffs it is contended that the plaintiffs will expend large sums in keeping the records required by the statute and regulations under attack. However, a recognized representative of the banking industry has testified to the contrary in Congressional hearings on the statute under attack. Carl W. Desch, Senior Vice President, First National City Bank of New York, on behalf of the New York Clearing House Association, in *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st & 2d Sess. 316, 327 (1969 & 1970), stated:

> "I should like to emphasize if I may, sir, that the cost is not really the thing that is bothering us at all.

"It is the privacy aspect of what the bill might enable people to do, and what you do with the item, with those tremendous masses of paper and their value in relation to accessibility."

In addition Congressman Patman in House Report No. 91-975 91st Cong., 2d Sess. 1970 in reporting on H.R. 15073 published in 1971-1 Cum. Bull. 559, 560 stated:

"The photocopying requirements of the bill will not significantly increase the cost to the affected financial institutions. Most banks and other financial institutions already maintain the types of records contemplated by the bill. In addition, the cost of microfilming checks and similar drafts is minimal. It has been estimated that the average cost including labor and equipment for microfilming checks for banks ranges from less than 1½ mils for small-scale operations down to ½ mil or less for large-scale operations. By comparison with a 10 cent per check service charge, the photocopying cost is negligible.

"The identification of depositors and those authorized to deal with respect to accounts presents a related law enforcement problem. Most domestic financial institutions clearly identify their customers and such identification is readily available."

5. Preliminary injunctions should not be entered in the instant cases because said injunctions would not maintain the status quo, but would irrevocably impair the Government's right to financial information as provided for in the statute and regulations under attack. Absent the statute under attack and the regulations promulgated thereunder, banks throughout the country are free to keep incomplete

or no records and are free to destroy existing bank records after retaining them but for a short period of time. This, of course, results in information being lost to the Government forever. The statute under attack and the regulations promulgated thereunder seek to remedy this loss. Granting of the requested injunctions would not maintain the status quo but would continue this loss of information.

6. Injunctions should not be granted in the instant suits in that these suits are in substance unconsented suits against the sovereign and therefore violative to the principle of sovereign immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

Jul 13 1972

/s/ JAMES L. BROWNING, JR.
James L. Browning, Jr.
United States Attorney

/s/ JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division

/s/ JOHN J. MCCARTHY
John J. McCarthy
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Fortney H. Stark, Jr., Security National Bank, Charles C. Marson, American Civil Liberties Union of Northern California, Inc., Fred Lieberman, Edward C. Harwood, Carl Bruer, Edward Durell, and Does Five through Twenty, inclusive, *Plaintiffs,* vs. John B. Connally, Jr., Secretary of the Treasury, George P. Shultz, Secretary-Designate of the Treasury, William B. Camp, Comptroller of the Currency, Myles J. Ambrose, Commissioner of Customs, Johnnie M. Walters, Commissioner of the Internal Revenue Service, Herman Nickerson, Jr., Administrator of the National Credit Union, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and Does Twenty-One through Forty, inclusive, *Defendants.*	No. C-72-1045-WTS

FIRST AMENDED COMPLAINT

Plaintiffs allege:

I.

This is an action for injunctive, mandamus, and declaratory relief to prevent the enforcement of an Act of Congress, and Regulations promulgated thereunder, which require the reporting of certain financial transactions and the making and retention of copies of checks and records by banks, other financial institutions, and individuals. This Court has jurisdiction under Title 5, U.S.C., Sections 701-06, and Title 28, U.S.C., Sections 1331, 1332, 1346, 1348, 1349, 1361, 2201, and 2282, as hereinafter more fully alleged.

II.

In 1970 the Congress of the United States enacted and the President of the United States signed into law Public Law 91-508, 84 Stat. 1114 et seq., referred to hereinafter as "the Act."

III.

In April, 1971, purportedly pursuant to the authority granted to him by the Act, the Secretary of the Treasury promulgated certain regulations adding Part 103 to the Code of Federal Regulations, referred to hereinafter as "the Regulations." Said Regulations will become effective July 1, 1972.

IV.

Plaintiff Fortney H. Stark, Jr., is the President of the Security National Bank and a customer of and depositor therein, and a resident of the judicial district of the United States District Court for the Northern District of California.

V.

Plaintiff Security National Bank is a duly chartered, insured and operating national bank, with its principal office in Walnut Creek, California.

VI.

Plaintiff Charles C. Marson is a resident of Berkeley, California, a customer of and depositor in the Bank of America, a duly chartered, insured and operating national bank with its principal office in San Francisco, California.

VII.

Plaintiff American Civil Liberties Union of Northern California, Inc., is a non-profit membership corporation organized under the laws of the State of California, with its principal office in San Francisco, California, which is dedicated solely to the preservation and advancement of the guarantees of individual liberties found in the United States Constitution and the Bill of Rights through litigation, legislation and education. Plaintiff American Civil Liberties Union of Northern California, Inc. is regarded by many as a controversial organization. Plaintiff American Civil Liberties Union of Northern California, Inc. desires, and its members desire, to maintain the identities of its members and contributors in strict confidence.

VII-A.

Plaintiff Fred Lieberman is a resident of Elkins Park, Pennsylvania. Plaintiff Edward C. Harwood is a resident of Barrington, Massachusetts. Plaintiff Carl Bruer is a resident of Princeton, New Jersey. Plaintiff Edward Durell is a resident of Columbus, Ohio.

VII-B.

Plaintiff Lieberman has repeatedly in the recent past transported, mailed or shipped, or caused to transported, mailed or shipped, one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States, and expects to have reason to

do so again in the near future. Plaintiff Liberman objects to those portions of the Act and Regulations that require him to report such transactions because he regards such requirements as unconstitutional, for the reasons more fully alleged hereinafter.

VII-C.

Plaintiffs Liberman, Harwood, Bruer and Durell each maintain a financial interest in and signature authority over one or more bank accounts in foreign countries. Each of said plaintiffs objects to those portions of the Act and Regulations that require him to report such interest and authority to the Government because he regards the such requirements as unconstitutional, for the reasons more fully alleged hereinafter.

VIII.

Plaintiffs do not now know the names or capacities of plaintiffs Doe Five through Doe Twenty, inclusive, and will amend this Complaint as soon as the names and capacities of said Plaintiffs are ascertained.

IX.

Defendant John B. Connally, Jr. is the Secretary of the Treasury of the United States (hereinafter referred to as "the Secretary"). Defendant Charles Shultz has been appointed as Secretary of the Treasury, subject to confirmation by the United States Senate. Defendants Connally and Shultz are charged with the duty and responsibility of enforcing the Act and Regulations.

X.

Defendant William B. Camp is Comptroller of the Currency; defendant Myles J. Ambrose is Commissioner of Customs; defendant Johnnie M. Walters is Commissioner of the Internal Revenue Service; defendant Herman Nick-

erson, Jr. is Administrator of the National Credit Union. Defendants Camp, Ambrose, Walters, Nickerson, and the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission are charged under the Act and Regulations with the duty and responsibility of enforcing the Act and Regulations.

XI.

Plaintiffs do not now know the names or capacities of Defendants Doe Twenty-One through Doe Forth, inclusive, and will amend this Complaint as soon as the names and capacities of said Defendants are ascertained.

XII.

The Act and Regulations require that Plaintiff Security National Bank affirmatively and promptly report to the Secretary, in addition to other transactions, the following:

a. the transportation by it of a monetary instrument having a value of more than $5,000.00 into or out of the United States;

b. each deposit, withdrawal, exchange of currency or other payment by, through, or to Security National Bank which involves a transaction in currency of mofe than $10,000.00; except that plaintiff Security National Bank is not required to report transactions with an established customer which it reasonably concludes does not exceed in its currency transactions amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.

XIII.

The Act and Regulations further require that plaintiff Security National Bank retain either the original or a

microfilm or other copy or reproduction of each of the following:

a. the front and back of all checks and money orders drawn on it; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criteria are exempt;

b. records of each transaction involving a checking or savings account;

c. records of each extension of credit of more than $5,000.00 not secured by real property;

d. records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

XIV.

The reporting and recordkeeping requirements under the Act and Regulations may be modified or expanded at the will of the Secretary under C.F.R. 103.45(a), which provides, in part, as follows:

> The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions.

XV.

If the Act and Regulations are permitted to become effective, plaintiff Security National Bank will be forced

to violate good banking practice and its customers' right of privacy and confidentiality in their financial and personal affairs and as a direct and proximate result thereof will lose significant numbers of its customers and substantial deposits. The monetary damage to plaintiff Security National Bank as a direct and proximate result of the implementation of the Act and Regulations will be in excess of $10,000.00.

XVI.

Plaintiff American Civil Liberties Union of Northern California, Inc. maintains accounts in the Wells Fargo Bank and Trust Company at its Market-Montgomery Street branch in the City and County of San Francisco.

The Act and Regulations provide that the Secretary may make any information set forth in any reports received by him pursuant to the Regulations available to any other department or agency of the United States upon the written request of the head of such department or agency.

The Federal Bureau of Investigation is such an agency of the United States.

Neither the Act nor the Regulations provide that information received from the Secretary by a department or agency of the United States must be maintained confidentially.

As heretofore alleged by plaintiff Security National Bank, the Regulations may be modified or expanded at the will of the Secretary and said modifications or expansions may be made to apply to particular persons or to particular classes of persons.

If the Act and Regulations are permitted to become effective, plaintiff American Civil Liberties Union of Northern California, Inc. will no longer be able to reasonably and effectively maintain the anonymity of its members and contributors and as a direct and proximate result thereof

will lose significant numbers of its members and substantial contributions. The monetary damage to plaintiff American Civil Liberties Union of Northern California, Inc. as a direct and proximate result of the implementation of the Act and Regulations will be in excess of $10,000.00.

XVII.

Plaintiff Stark is a depositor in plaintiff Security National Bank and, as heretofore alleged, plaintiff Marson is a depositor in the Bank of America.

If the Act and Regulations are permitted to become effective, plaintiffs Stark and Marson's contributions and dues to organizations and associations may be easily and simply determined by the Secretary or his designate from information required to be maintained and reported pursuant to the Regulations and as a direct and proximate result thereof plaintiffs Stark and Marson will suffer a chilling effect upon their right of association as guaranteed by the First Amendment to the United States Constitution and an abridgment of their constitutional right of privacy.

If the Act and Regulations are permitted to become effective:

a. the information required to reconstruct plaintiffs Stark and Marson's demand deposit accounts and to trace any check deposited in such accounts through the banks' domestic processing systems must be maintained and is subject to seizure, without notice to plaintiffs Stark or Marson, by written order of the Secretary;

b. plaintiffs Stark and Marson's banks must maintain the original or reproduce each statement, ledger card or other record concerning their respective deposit accounts, showing each transaction in, or with respect to, that account and such records are subject

to seizure, without notice to plaintiffs Stark or Marson, by written order of the Secretary; and

c. plaintiffs Stark and Marson's banks must maintain the original or reprodnce each check or money order drawn from their respective deposit accounts and submit the same to the Secretary, without notice to plaintiffs Stark or Marson, upon written order of the Secretary.

As a direct and proximate result thereof, plaintiffs Stark and Marson's right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution will be violated.

XVII-A.

If the Act and Regulations are permitted to become effective, plaintiff Lieberman will be forced to report to the Government the details of each transaction in which he transfers a monetary instrument of a value in excess of $5,000 from a place inside the United States to a place outside the United States. As a direct and proximate result thereof plaintiff Lieberman's right to be free of unreasonable seizures and his right to privacy will be violated.

XVII-B.

If the Act and Regulations are permitted to become effective, plaintiffs Lieberman, Harwood, Bruer and Durell will each be forced to report to the Government his financial interest in and signature authority over his bank account or accounts in foreign countries. As a direct and proximate result thereof said plaintiffs' rights to be free of unreasonable seizures and rights of privacy will be violated.

XVIII.

Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of law. If this Court does not enjoin

defendants as hereinafter prayed, plaintiffs will immediately and irreparably suffer injury as hereinbefore alleged.

XIX.

An actual controversy exists between plaintiffs and defendants. Plaintiffs believe and allege that the Act and Regulations are unconstitutional, null and void in their entirety because they violate the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. Plaintiffs are informed and believe and, based upon such information and belief, allege that defendants contend that the Act and Regulations are legal and constitutional in all respects.

Wherefore plaintiffs pray that this Court:

1. Issue preliminary and permanent injunctions and its writ of mandate enjoining and preventing defendants and their agents, servants, employees, representatives and successors from enforcing any of the provisions of the Act and Regulations in dispute herein;

2. Issue a declaratory judgment declaring the Act and Regulations in dispute herein unconstitutional, null and void in their entirety as being repugnant to the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution;

3. Grant plaintiffs the costs of suit herein; and

4. Grant such other and further relief as is just.

Dated: July 14, 1972

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
Attorneys for Plaintiffs

State of California
City and County of San Francisco—ss.

VERIFICATION

Charles C. Marson, being sworn, declares and says:

I am one of the plaintiffs herein; I have read the foregoing First Amended Complaint. The matters stated therein are true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe them to be true.

Dated at San Francisco, California, this 14th day of July, 1972.

CHARLES C. MARSON

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Charles C. Marson
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Attorneys for Plaintiffs

United States District Court
Northern District of California

Civil No. C-72-1045-WTS
[Title omitted in printing]

NOTICE OF MOTION AND MOTION FOR LEAVE TO AMEND COMPLAINT BY ADDING PLAINTIFFS

To the Above-Named Defendants and to Their Attorneys: Please Take Notice that on Monday, July 17, 1972, at 10:00 A.M., in the Courtroom of the Honorable William T. Sweigert, United States District Judge, at 450 Golden Gate Avenue, San Francisco, Plaintiffs will move for leave to amend their Complaint in the manner set forth in the First Amended Complaint, attached hereto and incorporated by reference herein. Said Motion will be based upon the accom-

panying Memorandum of Points and Authorities and upon all the pleadings and papers on file herein.

Dated: July 14, 1972

Respectfully submitted,

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
Attorneys for Plaintiffs

MOTION FOR LEAVE TO AMEND COMPLAINT BY ADDING PLAINTIFFS

Plaintiffs hereby move for leave to amend their Complaint by adding plaintiffs in the manner set forth in the First Amended Complaint, attached hereto and incorporated by reference herein.

Dated: July 14, 1972

Respectfully submitted,

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By CHARLES C. MARSON
Attorneys for Plaintiffs

United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* vs. John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	NO. 72 1045
The California Bankers Association, *Plaintiff,* vs. John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	NO. 72 1157

MEMORANDUM OF DECISION

Before: Hamlin,* Circuit Judge, EAST and SWEIGERT, District Judges

SWEIGERT, J.

Plaintiffs in No. 72 1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72 1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank

*Judge Hamlin dissents in part.

Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051-1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. subpart C, Secs. 103.31-103.37. Section 1829b(b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31-103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional viola-

tion in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 101 and 121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21-103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

Reporting of Foreign Financial Transactions

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub. b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101, excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United

States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122).

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, there is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) at 526. The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveilance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign powers are involved. See, *United States v. United States District Court,* ..... U.S. ..... (6/19/72) (slip opinion pp. 10-12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

Reporting of Domestic Financial Transactions

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by person participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Transaction-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary instruments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm al checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction, the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further, such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment.[1]

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1. It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

That there is such a thing as a constitutionally protected "right of privacy" has been recognized by the Supreme Court in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) and most recently in *United States v. United States District Court* ..... U.S. ..... (June 19, 1972).[1a]

In *Katz v. United States*, supra, the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274 U.S. 559, 563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See, *Rios v. United States*, 364 U.S. 253 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) . . . No less than an individual in a business office, in a friends apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

1a. See also, *Doe v. McMillan*, 442 F.2d 879 (D.C.Cir. 1971); *York v. Story*, 324 F.2d 250 (9th Cir. 1963); *Zimmerman v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936). But see, 25 F.Supp. (1938), aff'd in 105 F.2d 583, 586 (1939); *Dietmann v. Time*, 284 F.Supp. 925 (C.D.Cal. 1966); *City of Carmel v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex v. Smith*, 146 Atl. 34 (New Jersey 1969).

Harlan, J. concurring at p. 360-361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States v. United States District Court,* ..... U.S. ..... (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel v. Young, supra* the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold v. Connecticut, supra,* held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrustion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case

where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a fifth Amendment self-incrimination. *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States*, 387 F.2d 617 (10th Cir. 1968); *Application of Cole*, 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend*, 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the customer's account, and (2) the government agency was fol-

lowing established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detail information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz*, supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel v. Young*, supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" . . . "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold v. Connecticut, supra,* 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker, supra,* 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from

the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summon the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the bank or by the customer-taxpayer himself as an intervening third party interest whose financial transactions are involved. *Reisman v. Coplin*, 375 U.S. 440 (1964).[2]

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2. It is true that in *Donaldson v. United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States v. Kordell*, 397 U.S. 1, 7; and *Reisman v. Coplin*, 385 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States v. Morton Salt*, 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro v. United States*, 335 U.S. 1 (1948) at 32-33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds

have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann v. Securities & Exchange Commission*, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States v. United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel v. Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury, testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U. S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, *whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be

contested in court in the same manner as it heretofore has been contested." (emphasis added).

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.

Dated: August 4th, 1972

O. D. HAMLIN
Circuit Judge

/s/ WILLIAM G. EAST
William G. East
District Judge

/s/ W. T. SWEIGERT
W. T. Sweigert
District Judge

STARK, et al. v. CONNALLY, et al.—No. 72-1045
CALIFORNIA BANKERS ASSOCIATION v. CONNALLY, et al.—No. 72-1157

Hamlin, Circuit Judge, dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

/s/ O. D. HAMLIN

United States District Court
Northern District of California

Filed—Oct 18 1972

Charles J. Ulfers, Clerk

[Title omitted in printing]

ORDER GRANTING IN PART PRELIMINARY INJUNCTION

These actions having regularly come on for hearing pursuant to 28 U.S.C. §§ 2282 and 2284, F.R.Civ.P. 65, and LR 17, 114 and 117, Honorable William T. Sweigert, District Judge, Honorable William G. East, Senior District Judge, Honorable Oliver D. Hamlin, Senior Circuit Judge, presiding upon the plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss, and a memorandum of decision setting forth and specifying findings of fact and conclusions of law in accordance with F.R.Civ.P. 52 and 65(d) having been duly rendered and filed herein on September 11, 1972:

Now, therefore, in accordance with said memorandum of decision, it is hereby

(1) Ordered that the temporary restraining order heretofore entered in this action on June 30, 1972, be and it hereby is dissolved; and it is further

(2) Ordered that, it having been decided by the Court that certain provisions of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970), are repugnant to Amendment IV of the Constitution of the United States—to wit: Sections 221, 222, and 223 of Chapter 2 of Title II (Short title: "Currency and Foreign Transactions Reporting Act") of said Public Law 91-508, 84 Stat. at 1122 (now contained in Sections 1081, 1082, and 1083 of Title 31, United States

Code), plaintiff's motion to enjoin the enforcement, operation and execution of said specified provisions of said law is granted pending final adjudication of this action, and that defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, be and they hereby are enjoined from enforcing and from implementing by regulations under Part 103, Subparts B and D of Title 31, Code of Federal Regulations, or otherwise, the provisions contained in Sections 1081, 1082, and 1083 of Title 31, United States Code, until further order of this Court or until the adjudication of this action otherwise becomes final; and it is further

(3) Ordered that, it having been decided by the Court that the provisions of said Public Law 91-508, other than those specifically referred to and enjoined in clause (2) above are not repugnant to any provision of the Constitution of the United States, plaintiff's motion to enjoin the enforcement, operation and execution of all other provisions of said law—to wit: those provisions of Titles I and II of said Public Law 91-508, 84 Stat. 1114-1124, now contained in Sections 1730d, 1829b, and 1951 through 1959 of Title 12, United States Code, and in Sections 1051 through 1062, and 1101 through 1122 of Title 31, United States Code, is denied in all respects; and it is further

(4) Ordered that defendants' motion to dismiss the complaint for failure to state claims upon which relief can be granted is denied without prejudice.

Ordered in accordance with 28 U.S.C. § 2284(5) this 18th day of October, 1972, at San Francisco, California.

/s/ William G. East
William G. East
Senior District Judge

/s/ William T. Sweigert
William T. Sweigert
District Judge

James L. Browning, Jr.
United States Attorney

John M. Youngquist
Assistant United States Attorney
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Attorneys for Defendants

In the United States District Court for the Northern District of California

Original Filed
Nov. 16, 1972
Clerk, U. S. Dist. Court
San Francisco

The California Bankers Association, *Plaintiff,* v. John B. Connally, Jr., Secretary of the Treasury of the United States; George P. Shultz, Secretary-Designate of the Treasury; William B. Camp, Comptroller of the Currency; Myles J. Ambrose, Commissioner of Customs; Johnnie M. Walters, Commissioner of the Internal Revenue Service; Herman Nickerson, Jr., Administrator of the National Credit Union; The Board of Governors of the Federal Reserve System; the Federal Home Loan Bank Board; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission, *Defendants.*	No. C-72-1157-WTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM ORDER GRANTING IN PART PRELIMINARY INJUNCTION

Notice is hereby given that all defendants above named hereby appeal to the Supreme Court of the United States from that portion of the Order Granting In Part Preliminary Injunction filed in this action on October 18, 1972, which holds under clause (2) thereof, and Act of Congress (to wit: Public Law 91-508, 84 Stat. 1114) to be unconstitutional in part, said order being an interlocutory order granting an interlocutory injunction restraining the enforcement of said Act in part.

This appeal is taken and this notice is filed pursuant to 28 U.S.C. §§ 1252, 1253, 2101(a), and 2282, and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take further notice that a previous notice of appeal in this action was filed by defendants on October 6, 1972, from that portion of the decision of the three-judge Court filed herein on September 11, 1972, which could be construed as an appealable interlocutory order. The order of October 18, 1972, granting in part preliminary injunction, may now be construed as the appealable order issuing from said decision and may accordingly moot the notice of appeal filed October 6, 1972. Therefore, the instant notice of appeal is filed by defendants.

DATED: November 13, 1972.

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ JOHN M. YOUNGQUIST
John M. Youngquist
Assistant United States Attorney
Chief, Tax Division
Attorneys for Defendants

[Certificate of Service by Mail omitted in printing]

In the United States District Court for the Northern District of California

(No. C-72-1045-WTS)

Fortney H. Stark, Jr., Security National Bank, Charles C. Marson, American Civil Liberties Union of Northern California, Inc., Fred Lieberman, Edward C. Harwood, Carl Bruer, Edward Durell, and Does Five Through Twenty, Inclusive, Plaintiffs

v.

John B. Connally, Jr., Secretary of the Treasury, George P. Shultz, Secretary-Designate of the Treasury, William B. Camp, Comptroller of the Currency, Myles J. Ambrose, Commissioner of Customs, Johnnie M. Walters, Commissioner of the Internal Revenue Service, Herman Nickerson, Jr., Administrator of the National Credit Union, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and Does Twenty-One Through Forty, Inclusive. Defendants

James L. Browning, Jr.,
United States Attorney.

John M. Youngquist,
Assistant United States Attorney,
Chief, Tax Division.
San Francisco, California 94102,
Attorneys for Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM ORDER GRANTING IN PART PRELIMINARY INJUNCTION

NOTICE IS HEREBY GIVEN that all defendants above named hereby appeal to the Supreme Court of the United States from that portion of the Order Granting In Part Preliminary Injunction filed in this action on October 18, 1972,

which holds under clause (2) thereof, an Act of Congress (to wit: Public Law 91-508, 84 Stat. 1114) to be unconstitutional in part, said order being an interlocutory order granting an interlocutory injunction restraining the enforcement of said Act in part.

This appeal is taken and this notice is filed pursuant to 28 U.S.C. §§ 1252, 1253, 2101(a), and 2282, and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take Further Notice that a previous notice of appeal in this action was filed by defendants on October 6, 1972, from that portion of the decision of the three-judge Court filed herein on September 11, 1972, which could be construed as an appealable interlocutory order. The order of October 18, 1972, granting in part preliminary junction, may now be construed as the appealable order issuing from said decision and may accordingly moot the notice of appeal filed October 6, 1972. Therefore, the instant notice of appeal is filed by defendants.

JAMES L. BROWNING, JR.,
United States Attorney.

By JOHN M. YOUNGQUIST,
Assistant United States Attorney,
Chief, Tax Division,
Attorneys for Defendants.

Dated: November 13, 1972.

John M. Anderson
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Attorney for
The California Bankers Association

United States District Court for the
Northern District of California

No. C 72-1157 WTS

[Title omitted in printing]

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Please take notice that the plaintiff, The California Bankers Association, cross-appeals to the Supreme Court of the United States from that portion of the order filed in this case on October 18, 1972, denying, in part, plaintiff's motion for a preliminary injunction against an Act of Congress, and specifically, from that portion of the order included in the third numbered paragraph denying plaintiff's motion for an order enjoining enforcement, operation, and execution of those provisions of Titles I and II of Public Law 91-508, 84 Stat. 1114-1124, now contained in Sections 1730(d), 1829(b), and 1951-1959 of Title XII, United States Code, and Sections 1051-1062 and 1101-1122 of Title XXXI, United States Code.

This cross-appeal is taken and this notice is filed and served pursuant to 28 U.S.C. §§ 1253 and 2101(a), and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take further notice that a previous notice of cross-appeal in this case was filed by the plaintiff on October 10, 1972. The foregoing notice of cross-appeal was taken from

that portion of a memorandum decision filed in this case on September 11, 1972, and which might have been construed as an appealable interlocutory order. The order of October 18, 1972, described above, granting in part and denying in part plaintiff's motion for a preliminary injunction, may now be construed as the appealable order issuing from said decision, and may accordingly make the notice of cross-appeal filed in this case on October 10, 1972, moot. For that reason, the plaintiff files the foregoing notice of cross-appeal.

Dated: November 16, 1972

JOHN M. ANDERSON

Attorney for
The California Bankers Association

By /s JOHN M. ANDERSON
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Attorneys for Plaintiffs

United States District Court
Northern District of California

No. C-72-1045-WTS

[Title omitted in printing]

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Please Take Notice that Fortney H. Stark, Jr., Security National Bank, Charles C. Marson, American Civil Liberties Union of Northern California, Inc., Fred Lieberman, Edward C. Harwood, Carl Bruer, Edward Durell, and Does Five through Twenty, inclusive, all of the plaintiffs in the above-named action, cross-appeal to the Supreme Court of the United States from that portion of the order filed in this case on October 18, 1972, denying, in part, plaintiffs' motion for a preliminary injunction against an Act of Congress, and specifically, from the portion of the order included in the third numbered paragraph denying plaintiffs' motion for an order enjoining enforcement, operation, and execution of those provisions of Titles I and

II of Public Law 91-508, 84 Sta. 1114-1124, now contained in Sections 1730(d), 1829(b), and 1951-1959 of Title XII, United States Code, and Sections 1051-1062 and 1101-1122 of Title XXXI, United States Code.

This cross-appeal is taken and this notice is filed and served pursuant to 28 U.S.C. §§ 1253 and 2101(a), and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please Take Further Notice that a previous notice of cross-appeal in this case was filed by the plaintiffs on October 11, 1972. The foregoing notice of cross-appeal was taken from that portion of a memorandum decision filed in this case on September 11, 1972, and which might have been construed as an appealable interlocutory order. The order of October 18, 1972, described above, granting in part and denying in part plaintiffs' motion for a preliminary injunction, may not be construed as the appealable order issuing from said decision, and may accordingly make the notice of cross-appeal filed in this case on October 10, 1972, moot. For that reason, the plaintiffs file the foregoing notice of cross-appeal.

DATED: November 17, 1972

HENRY RAMSEY, JR.
CHARLES C. MARSON
PETER SHEEHAN
NEIL HORTON
DEENE SOLOMON

By PETER SHEEHAN
Attorneys for Plaintiffs

Supreme Court of the United States

No. 72-985, 72-1073, 72-1196

The California Bankers Association,
Appellant,

v.

George P. Shultz, Secretary of the Treasury, et al.;

George P. Shultz, Secretary of the Treasury, et al.,
Appellants,

v.

The California Bankers Association, et al.; and
Fortney H. Stark, Jr., et al.,
Appellants,

George P. Shultz, et al.

Appeals from the United States District Court for the Northern District of California.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and two hours are allotted for oral argument.

October 9, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-985

THE CALIFORNIA BANKERS ASSOCIATION
Appellant,

v.

GEORGE P. SCHULTZ, SECRETARY of THE TREASURY, et al
Appellees.

Appellant's Jurisdictional Statement on Appeal

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GEORGE P. SCHULTZ, SECRETARY of THE TREASURY, et al
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Appellant's Jurisdictional Statement on Appeal

INTRODUCTION

This is the Bank Secrecy Act case.

Last October, a three-judge District Court for the Northern District of California entered an order enjoining in part enforcement of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970); 12 U.S.C. §§ 1829b and 1951-1959; 31 U.S.C. 1051-1122 (commonly known as the Bank Secrecy Act);[1] as well as applicable Treasury Regulations set forth at 31 C.F.R., Part 103 (1972).[2]

1. The text of the Act is included with this statement as *Appendix A.*

2. The Treasury Regulations are included with this statement as *Appendix B.*

The appellees filed a notice of appeal on November 13, 1972, and three days later the appellant here filed a notice of cross-appeal.[3]

OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of California is set forth at 347 F. Supp. 1242 (N.D. Cal. 1972), and is included with this statement as *Appendix D.*

THIS COURT'S JURISDICTION

This appeal centers on the constitutionality of the Bank Secrecy Act, and specifically those provisions requiring financial institutions to make reports and maintain certain records.

On October 18, 1972, a three-judge District Court for the Northern District of California entered an order (1) enjoining enforcement of those provisions of the Act requiring reports of certain domestic currency transactions; but (2) holding constitutional those provisions requiring banks and other financial institutions to maintain certain records, and requiring reports of various foreign financial transactions.[4]

Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1253. See generally, *Goldstein v. Cox*, 396 U.S. 471 (1970).

QUESTIONS PRESENTED

The questions presented by this appeal are whether the record-keeping requirements of the Bank Secrecy Act (1) violate the Fourth Amendment guarantee against unreasonable search and seizure; and whether (2) those re-

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3. The notice of cross-appeal is appended to this statement as *Appendix C.*

4. The District Court's order is appended to this statement as *Appendix E.*

quirements confiscate a bank asset—the assurance of customer privacy—without due process of law.

STATEMENT OF FACTS

In October, 1970, Congress enacted legislation what has come to be known as the Bank Secrecy Act.[5] The Act was adopted "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings".[6] The Act authorized adoption of appropriate regulations by the Secretary of the Treasury.[7]

On March 31, 1972, the Treasury Secretary promulgated regulations that require prompt reports of certain financial transactions from individuals, banks and other financial institutions, and the copying and retention of virtually every writing and document that passes through the American banking system.[8]

This case came to court on June 22, 1972, with a suit by the plaintiff/appellant challenging the constitutionality of the Act and its implementing regulations, and seeking injunctive and declaratory relief. The District Court ordered consolidation with *Stark v. Connally*, U.S.D.C., N.D. Cal., No. 72-1045 WTS; convened a three-judge court;[9] and issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions, and persons . . ."[10]

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5. Public Law 91-508, 84 Stat. 114, *et seq.*

6. 31 U.S.C. § 1051. See also 12 U.S.C. § 1829b(a)(2).

7. 31 U.S.C. § 1053. See also 12 U.S.C. § 1829b(b).

8. See 31 C.F.R., Part 103.11-103.52 (1972).

9. See 28 U.S.C. § 2284.

10. Memorandum of Decision on Application for Temporary Restraining Order, June 30, 1972, *Stark v. Connally*, U.S.D.C., N.D. Cal., No. 72-1045 WTS, and Consolidated Case.

The plaintiff/appellant here then joined with the plaintiffs in the *Stark* case, *supra,* in a motion for a preliminary injunction. On September 11, 1972, the three-judge court filed a memorandum decision, and entered an order on October 18, 1972, granting in part and denying in part the plaintiffs' motion.[11] The Government filed a notice of appeal to this court, and on November 16, 1972, the Appellant filed a notice of appeal from that portion of the order denying its motion for an order enjoining enforcement, operation and execution of the record-keeping requirements of the Act.

THIS APPEAL PRESENTS SUBSTANTIAL QUESTIONS

The Bank Secrecy Act makes banks and other financial institutions unwilling and unwitting diarists of their customers' financial lives. It imposes both record-keeping and reporting requirements on virtually all financial institutions.

The court below issued a preliminary injunction enjoining enforcement of the Act's reporting provisions, finding those provisions unconstitutional. The court below refused, however, to enjoin enforcement of the Act's record-keeping provisions. The latter require banks and other financial institutions to:

(1) Identify each person having an account;

(2) Identify each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any account;

(3) Identify any party not already identified for whose account any check draft or similar instrument has been received for deposit or collection; and

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11. See *Appendix E.*

(4) Microfilm or otherwise reproduce any check, draft, or similar instrument either drawn on and presented to it for payment or received by it for deposit or collection.[12]

In alleged implementation of the foregoing the Secretary of the Treasury has promulgated regulations requiring banks, *inter alia*, to:

(1) Secure and maintain a taxpayer identification number for each person or legal entity maintaining an account;

(2) Secure and maintain the social security number of an individual having a financial interest in an account where one or more individuals maintain an account;

(3) Microfilm or copy each document granting signature authority or each deposit or share account;

(4) Microfilm or copy each statement, ledger card, "or other record" showing *each* transaction with respect to the account;

(5) Microfilm or copy each check, clean draft, or a money order drawn on the bank or issued by it, with exceptions under certain circumstances for accounts averaging at least 100 checks per month and which fall into certain specifically enumerated categories, such as dividend, payroll, employee and medical benefit checks;

(6) Microfilm or copy each item other than bank or periodic charges made pursuant to agreement with the customer comprising a debit to the account which is not otherwise specifically required to be kept and which is not specifically exempted; and

(7) Microfilm or copy records prepared or received by a bank in the ordinary course of business which would be needed to reconstruct a checking account and trace a check deposited in the account through its

12. 12 U.S.C. § 1829b(c) and (d).

domestic processing system or supply a description of the deposited check.[13]

Banks are required to retain the records necessary to reconstruct a checking account for two years. All of the other records described above are to be retained for five years.[14]

Banks have been ordered to make and retain the foregoing records because the Congress and the Secretary have determined that they "have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings."[15] Nowhere in the Act or regulations or in the legislative history is there any suggestion that the records are required for regulation or supervision of the banks as such. On the contrary, the Bank Secrecy Act is aimed at the banks' *customers*. The government cannot argue, for example, that copies of the fronts and backs of all checks or the records needed to reconstruct a checking account[16] are suddenly required by the Federal Deposit Insurance Corporation of the Federal Reserve Board.

The government could not hope to defend an act of Congress directing telephone companies to record and retain recordings of all telephone calls by all their various subscribers. Such an act would surely violate the Fourth Amendment right to freedom from "broad and unsuspected governmental incursions into conversational privacy". *U.S. v. U.S.D.C., E.D. Mich.*, ... U.S. ....., 92 S.Ct. 2125, 2135 (1972). Checking accounts record a citizen's activities, opinions, and beliefs as fully as transcripts of his telephone conversations. The right to be protected is the same in both instances: privacy.

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13. 31 C.F.R. Part 103.34 (1972).
14. 31 C.F.R. Part 103.36(c) (1972).
15. 12 U.S.C. § 1829b(a), 31 C.F.R. Part 103.21 (1972).
16. See 31 C.F.R. Part 103.36 (a) and Part 103.34 (10) (1972).

The record-keeping requirements of the Act exist for the sole purpose of the reporting requirements enjoined by the Court below. As such, the Act's record-keeping provisions are infected with the same malady—unreasonableness.

Finally, it is of course well-established that "the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired." *Highland v. Russell Car and Snow Plow Co.*, 279 U.S. 253, 261 (1929). This right to enter into contractual relations respecting personal affairs is protected by the due process clause of the Fifth and Fourteenth Amendments. *Allegeyer v. Louisiana*, 165 U.S. 578, 591 (1897); *Adair v. United States*, 208 U.S. 161, 174 (1908); *Coppage v. Kansas*, 236 U.S. 1, 14 (1914); *Adkins v. Childrens Hospital*, 261 U.S. 525, 546 (1923). Congress may, of course, regulate the making and performance of contracts "whenever necessary to effect any of the great purposes for which the national government was created." *Highland v. Russell Car and Snow Plow Co., supra*, at 261. But there can be no suggestion here that the Bank Secrecy Act is an aid of national defense or domestic security or that any of this nation's "great purposes" would be impaired by a decision of this Court limiting required record-keeping to those documents that would ordinarily be kept by financial institutions.

The Bank Secrecy Act is said to be aimed at "petty criminals, members of the underworld, those engaging in 'white collar' crime, and income tax evaders.[17] Their apprehension, however desirable, would not seem to be one of this nation's "great purposes," and cannot justify the in-

17. 2 Cong. and Adm. News 1970, 4395-96.

vasion of privacy entailed in the record-keeping requirements of the Bank Secrecy Act.

Dated: January 8, 1973

Respectfully submitted,

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(Appendices Follow)

Appendix A

12 U.S.C. § 1829b.

§ 1829b. *Retention of records by insured banks—Congressional findings and declaration of purpose*

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Rules and Regulations

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

Identity of persons having accounts and persons authorized to act with respect to such accounts; exemptions

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual author-

ized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

Reproduction of checks, drafts, and other instruments; records of transactions; identity of party

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

Identity of persons making transactions reportable under the Currency and Foreign Transactions Reporting Act

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

Additions to or substitutes for required records

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

Retention period

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

Report to Congress by Secretary of the Treasury

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

Sept. 21, 1950, c. 967, § 2[21], as added Oct. 26, 1970, Pub. L. 91-508, Title I, § 101, 84 Stat. 1114.

U.S.C. § 1951-1959.

§ 1951. ***Congressional findings and declaration of purpose***

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 1953(b) of this title have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 1952 of this title may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree

of usefulness in criminal, tax, or regulatory investigations or proceedings.

Pub.L. 91-508, Title I, § 121, Oct. 26, 1970, 84 Stat. 1116.

§ 1952. *Reports on ownership and control*

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

Pub.L. 91-508, Title I, § 122, Oct. 26, 1970, 84 Stat. 1116.

§ 1953. *Recordkeeping and Procedures*

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) of this section, any records or evidence of any type which the Secretary is authorized under section 1829b of this title to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a sep-

arate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

Pub.L. 91-508, Title I, § 123, Oct. 26, 1970, 84 Stat. 1116.

§ 1954. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

Pub.L. 91-508, Title I, § 124, Oct. 26, 1970, 84 Stat. 1117.

§ 1955. *Civil penalties*

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title I, § 125, Oct. 26, 1970, 84 Stat. 1117.

§ 1956. *Criminal penalty*

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Pub.L. 91-508, Title I, § 126, Oct. 26, 1970, 84 Stat. 1118.

§ 1957. *Additional criminal penalty in certain cases*

Whoever willfully violates any regulation under this chapter, section 1829b of this title, or section 1730d of this title, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title I, § 127, Oct. 26, 1970, 84 Stat. 1118.

§ 1958. *Compliance*

The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and sections 1730d and 1829b of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

Pub.L. 91-508, Title I, § 128, Oct. 26, 1970, 84 Stat. 1118.

§ 1959. *Administrative procedure*

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 1829b of this title, and section 1730d of this title.
Pub.L. 91-508, Title I, § 129, Oct. 26, 1970, 84 Stat. 1118.

31 U.S.C. § 1051-1122.

§ 1051. *Congressional declaration of purpose*

It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.
Pub.L. 91-508, Title II, § 202, Oct. 26, 1970, 84 Stat. 1118.

§ 1052. *Definitions and rules of construction*

(a) The definitions and rules of construction set forth in this section apply for the purposes of this chapter.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this chapter generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 1813 of Title 12;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 1724 of Title 12;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this chapter to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision

wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this chapter or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5.

(k) For the purposes of section 1001 of Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this chapter to which the regulation relates.

Pub.L. 91-508, Title II, § 203, Oct. 26, 1970, 84 Stat. 1118.

§ 1053. *Regulations*

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this chapter.
Pub.L. 91-508, Title II, § 204, Oct. 26, 1970, 84 Stat. 1120.

§ 1054. *Compliance*

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this chapter. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.
Pub.L. 91-508, Title II, § 205, Oct. 26, 1970, 84 Stat. 1120.

§ 1055. *Exemptions*

The Secretary may make such exemptions from any requirement otherwise imposed under this chapter as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.
Pub.L. 91-508, Title II, § 206, Oct. 26, 1970, 84 Stat. 1120.

§ 1056. *Civil penalty*

(a) For each willful violation of this chapter, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this chapter, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title II, § 207, Oct. 26, 1970, 84 Stat. 1120.

§ 1057. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this chapter, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this chapter or any order of the Secretary made in pursuance thereof.

Pub.L. 91-508, Title II, § 208, Oct. 26, 1970, 84 Stat. 1120.

§ 1058. *Criminal penalty*

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Pub.L. 91-508, Title II, § 209, Oct. 26, 1970, 84 Stat. 1121.

§ 1059. *Additional criminal penalty in certain cases*

Whoever willfully violates any provision of this chapter where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title II, § 210, Oct. 26, 1970, 84 Stat. 1121.

§ 1060. *Immunity of witnesses*

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this chapter before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Pub.L. 91-508, Title II, § 211, Oct. 26, 1970, 84 Stat. 1121.

§ 1061. *Availability of information to other Federal agencies*

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this chapter available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

Pub.L. 91-508, Title II, § 212, Oct. 26, 1970, 84 Stat. 1121.

§ 1062. *Administrative procedure*

Subject to section 1052(j) of this title, the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5, shall apply to all proceedings under this chapter.

Pub.L. 91-508, Title II, § 213, Oct. 26, 1970, 84 Stat. 1121.

Subchapter II.—Domestic Currency Transactions

§ 1081. *Reports*

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Pub.L. 91-508, Title II, § 221, Oct. 26, 1970, 84 Stat. 1122.

§ 1082. *Persons required to file reports*

The report of any transaction required to be reported under this subchapter shall be signed or otherwise made both by the domestic financial institution involved

and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

Pub.L. 91-508, Title II, § 222, Oct. 26, 1970, 84 Stat. 1122.

§ 1083. *Reporting procedure*

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this subchapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this chapter, or section 1730d or 1829b of Title 12.

(b) Any person (other than an institution designated under subsection (a) of this section) required to file a report under this subchapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except that (1) if the institution is not designated under subsection (a) of this section, the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) of this section shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Pub.L. 91-508, Title II, § 223, Oct. 26, 1970, 84 Stat. 1122.

Subchapter III.—Reports of Exports and Imports of Monetary Instruments

§ 1101. *Reports—Persons required to file*

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed reports

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

Common carriers

(c) Subsection (a) of this section does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper. Pub.L. 91-508, Title II, § 231, Oct. 26, 1970, 84 Stat. 1122.

§ 1102. *Forfeiture*

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

Pub.L. 91-508, Title II, § 232, Oct. 26, 1970, 84 Stat. 1123.

§ 1103. *Civil liability*

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 1101 of this title, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required

to be filed. The liabilities imposed by this subchapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 1102 of this title.
Pub.L. 91-508, Title II, § 233, Oct. 26, 1970, 84 Stat. 1123.

§ 1104. *Remission of forfeiture or penalty*

The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just.
Pub.L. 91-508, Title II, § 234, Oct. 26, 1970, 84 Stat. 1123.

§ 1105. *Enforcement authority*

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 1101 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.
Pub.L. 91-508, Title II, § 235, Oct. 26, 1970, 84 Stat. 1123.

§ 1121. *Records and reports*

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

Pub.L. 91-508, Title II, § 241, Oct. 26, 1970, 84 Stat. 1124.

§ 1122. *Classifications and requirements*

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 1121 of this title.

(2) The foreign country or countries as to which any requirement imposed under section 1121 of this

title applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 1121 of this title.

(4) Types of transactions subject to or exempt from any requirement imposed under section 1121 of this title.

(5) Such other matters as he may deem necessary to the application of this subchapter.

Pub.L. 91-508, Title II, § 242, Oct. 26, 1970, 84 Stat. 1124.

Appendix B

31 C.F.R. § 103

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 *Meaning of Terms*

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 *Determination by the Secretary*

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22. *Reports of Currency Transactions*

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemp-

tion contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 *Report of Transportation of Currency or Monetary Instruments*

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to cur-

rency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 *Reports of Foreign Financial Accounts*

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 *Filing of Reports*

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 *Identification Required*

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taypayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 *Determination by the Secretary*

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 *Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts*

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such ac-

count. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 *Records to be Made and Retained by Financial Institutions*

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 *Additional Records to be Made and Retained by Banks*

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim

checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to

reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 *Additional Records to be Made and Retained by Brokers and Dealers in Securities*

(a)[4] With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a

domestic financial institution, from any person, account or place outside the United States.

§ 103.36 *Nature of Records and Retention Period*

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 *Person Outside the United States*

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic

account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 *Dollars as Including Foreign Currency*

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 *Photographic or Other Reproductions of Government Obligations*

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 *Availability of Information*

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding

in connection with which the information is sought, and the official need therefor.

§ 103.44 *Disclosure*

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 *Exceptions, Exemptions, Modifications, and Reports*

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 *Enforcement*

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured

savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 *Civil Penalty*

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 *Forfeiture of Currency or Monetary Instruments*

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 *Criminal Penalty*

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 *Enforcement Authority with respect to Transportation of Currency or Monetary Instruments*

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 *Effective Date*

This part shall become effective July 1, 1972.

Appendix C

Original Filed—Nov 16 1972
Clerk, U. S. Dist. Court
San Francisco

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Attorney for
The California Bankers Association

United States District Court
For the Northern District of California

No. C 72-1157 WTS

The California Bankers Association,
Plaintiff,

v.

John B. Connally, Jr., Secretary of the Treasury of the United States; George P. Shultz, Secretary-Designate of the Treasury; William B. Camp, Comptroller of the Currency; Myles J. Ambrose, Commissioner of Customs; Johnnie M. Walters, Commissioner of the Internal Revenue Service; Herman Nickerson, Jr., Administrator of the National Credit Union; The Board of Governors of the Federal Reserve System; the Federal Home Loan Bank Board; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission,
Defendants.

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that the plaintiff, The California Bankers Association, cross-appeals to the Supreme Court of the United States from that portion of the order filed in this case on October 18, 1972, denying, in part, plaintiff's motion for a preliminary injunction against an Act of Congress, and specifically, from that portion of the order included in the third numbered paragraph denying plaintiff's motion for an order enjoining enforcement, operation, and execution of those provisions of Titles I and II of Public Law 91-508, 84 Stat. 1114-1124, now contained in Sections 1730(d), 1829(b), and 1951-1959 of Title XII, United States Code, and Sections 1051-1062 and 1101-1122 of Title XXXI, United States Code.

This cross-appeal is taken and this notice is filed and served pursuant to 28 U.S.C. §§ 1253 and 2101(a), and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

PLEASE TAKE FURTHER NOTICE that a previous notice of cross-appeal in this case was filed by the plaintiff on October 10, 1972. The foregoing notice of cross-appeal was taken from that portion of a memorandum decision filed in this case on September 11, 1972, and which might have been construed as an appealable interlocutory order. The order of October 18, 1972, described above, granting in part and denying in part plaintiff's motion for a preliminary injunction, may now be construed as the appealable order issuing from said decision, and may accordingly make the notice of cross-appeal filed in this case on October

10, 1972, moot. For that reason, the plaintiff files the foregoing notice of cross-appeal.

Dated: November 16, 1972

JOHN M. ANDERSON
Attorney for
The California Bankers Association

By s/JOHN M. ANDERSON
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PROOF OF SERVICE
CERTIFICATE BY MEMBER OF SUPREME COURT BAR

The undersigned certifies that he is a member of the Bar of the Supreme Court of the United States and a member of the State Bar of California; that he is not a party to the within cause; that his office address is 3300 Crocker Plaza, San Francisco, California 94104; that he caused an envelope to be addressed to each of the following named persons; that he caused to be enclosed and sealed in each envelope a copy of the foregoing and attached document(s); and deposited each envelope with required postage fully prepaid in the United States mail at San Francisco, California on November 16, 1972.

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United States Attorney

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s/ JOHN M. ANDERSON

John M. Anderson

Appendix D

Original Filed Sep 11 1972
Clerk, U.S. Dist. Court San Francisco

United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

MEMORANDUM OF DECISION

Before: *HAMLIN,* Circuit Judge, EAST and SWEIGERT, District Judges*

SWEIGERT, J.

Plaintiffs in No. 72 1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72 1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

*Judge Hamlin dissents in part.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051-1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. subpart C, Secs. 103.31-103.37. Section 1829b(b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31-103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional violation in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 1101 and 1121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21-103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

Reporting of Foreign Financial Transactions

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101 excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of

currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122).

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, these is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) at 526.) The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveillance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign

powers are involved. See, *United States v. United States District Court*, ... U.S. ..... (6/19/72) (slip opinion pp. 10-12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

Reporting of Domestic Financial Transactions

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by persons participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Transaction-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary in-

struments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made both by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm all checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction, the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further,

such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to

an unreasonable search within the meaning of the Fourth Amendment.[1]

That there is such a thing as a constitutionally protected "right of privacy" has been recognized by the Supreme Court in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) and most recently in *United States v. United States District Court* ..... U.S. ..... (June 19, 1972).[1a]

In *Katz v. United States*, supra, the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See, *Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274 U.S. 559, 563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See *Rios v. United States*, 364 U.S. 253 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that

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1. It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

1(a). See also, *Doe v. McMillan*, 442 F.2d 879 (D.C.Cir. 1971); *York v. Story*, 324 F.2d 250 (9th Cir. 1963); *Zimmermann v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936). But see, 25 F.Supp. (1938), aff'd in 105 F.2d 583, 586 (1939); *Dietmann v. Time*, 284 F.Supp. 925 (C.D.Cal. 1966); *City of Carmel v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex v. Smith*, 146 Atl. 34 (New Jersey 1969).

the public telephone has come to play in private communication."

Harlan, J., concurring at p. 360-361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States v. United States District Court*, ... U.S. ..... (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel v. Young, supra,* the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold v. Connecticut, supra,* held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrusion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the

customer's account, and (2) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detail information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such, become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs

not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz*, supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel v. Young*, supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" . . . "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold v. Connecticut, supra,* 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker, supra,* 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summons the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the bank or by the customer-taxpayer himself as an intervening third party interest whose financial transactions are involved. *Reisman v. Coplin*, 375 U.S. 440 (1964).[2]

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

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2. It is true that in *Donaldson v. United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States v. Kordell*, 397 U.S. 1, 7; and *Reisman v. Coplin*, 385 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States v. Morton Salt,* 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro v. United States,* 335 U.S. 1 (1948) at 32-33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of

particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann v. Securities & Exchange Commission*, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States v. United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel v. Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury,

testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U. S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, *whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested." (emphasis added).

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the

Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.
Dated: August 4th, 1972

O. D. Hamlin
Circuit Judge

/s/ William G. East
William G. East
District Judge

/s/ W. T. Sweigert
W. T. Sweigert
District Judge

STARK, et al. v. CONNALLY, et al.—No. 72-1045

CALIFORNIA BANKERS ASSOCIATION v. CONNALLY, et al.—No. 72-1157

HAMLIN, Circuit Judge, dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein

to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

O. D. HAMLIN

Appendix E

Filed OCT 18 1972
CHARLES J. ULFERS, CLERK

United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* — vs. — John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* — vs. — John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

ORDER GRANTING IN PART PRELIMINARY INJUNCTION

These actions having regularly come on for hearing pursuant to 28 U.S.C. §§ 2282 and 2284, F.R.Civ.P. 65, and LR 17, 114 and 117, Honorable William T. Sweigert, District Judge, Honorable William G. East, Senior District Judge and Honorable Oliver D. Hamlin, Senior Circuit Judge, presiding upon the plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss, and a memorandum of decision setting forth and specifying findings of fact and conclusions of law in accordance with F.R.Civ.P. 52 and 65(d) having been duly rendered and filed herein on September 11, 1972:

NOW, THEREFORE, in accordance with said memorandum of decision, it is hereby

(1) ORDERED that the temporary restraining order heretofore entered in this action on June 30, 1972, be and it hereby is dissolved; and it is further

(2) ORDERED that, it having been decided by the Court that certain provisions of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970), are repugnant to Amendment IV of the Constitution of the United States—to wit: Sections 221, 222, and 223 of Chapter 2 of Title II (Short title: "Currency and Foreign Transactions Reporting Act") of said Public Law 91-508, 84 Stat. at 1122 (now contained in Sections 1081, 1082, and 1083 of Title 31. United States Code), plaintiff's motion to enjoin the enforcement, operation and execution of said specified provisions of said law is granted pending final adjudication of this action, and that defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, be and they hereby are enjoined from enforcing and from implementing by regulations under Part 103, Subparts B and D of Title 31, Code of Federal Regulations, or otherwise, the provisions contained in Sections 1081, 1082, and 1083 of Title 31, United States Code, until further order of this Court or until the adjudication of this action otherwise becomes final; and it is further

(3) ORDERED that, it having been decided by the Court that the provisions of said Public Law 91-508, other than those specifically referred to and enjoined in clause (2) above are not repugnant to any provision of the Constitution of the United States, plaintiff's motion to enjoin the enforcement, operation and execution of all other provisions of said law—to wit: those provisions of Titles I and II of said Public Law 91-508, 84 Stat. 1114-1124, now con-

tained in Sections 1730d, 1829b, and 1951 through 1959 of Title 12, United States Code, and in Sections 1051 through 1062, and 1101 through 1122 of Title 31, United States Code, is denied in all respects; and it is further

(4) ORDERED that defendants' motion to dismiss the complaint for failure to state claims upon which relief can be granted is denied without prejudice.

ORDERED in accordance with 28 U.S.C. § 2284(5) this 18th day of October, 1972, at San Francisco, California.

/s/ WILLIAM G. EAST
William G. East
Senior District Judge

/s/ W. T. SWEIGERT
William T. Sweigert
District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

JOHN B. CONNALLY, JR., Secretary of the Treasury of the United States; GEORGE P. SHULTZ, Secretary-Designate of the Treasury; WILLIAM B. CAMP, Comptroller of the Currency; MYLES J. AMBROSE, Commissioner of Customs; JOHNNIE M. WALTERS, Commissioner of the Internal Revenue Service; HERMAN NICKERSON, JR., Administrator of the National Credit Union; THE BOARD OF GOVERNORS of the FEDERAL RESERVE SYSTEM; the FEDERAL HOME LOAN BANK BOARD; the FEDERAL DEPOSIT INSURANCE CORPORATION; and the SECURITIES AND EXCHANGE COMMISSION,

Appellants,

v.

THE CALIFORNIA BANKERS ASSOCIATION,

Appellee and Cross-Appellant.

Appellee's Jurisdictional Statement on Cross-Appeal

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Appellants,

v.

THE CALIFORNIA BANKERS ASSOCIATION,

Appellee and Cross-Appellant.

Appellee's Jurisdictional Statement on Cross-Appeal

INTRODUCTION

This is the Bank Secrecy Act Case.

Last October, a three-judge District Court for the Northern District of California entered an order enjoining in

part enforcement of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970); 12 U.S.C. §§ 1829b and 1951-1959; 31 U.S.C. 1051-1122 (commonly known as the Bank Secrecy Act);[1] as well as applicable Treasury Regulations set forth 31 C.F.R., Part 103 (1972).[2]

The appellants filed a notice of appeal on November 13, 1972, and three days later the appellee filed a notice of cross-appeal.

OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of California is set forth at 347 F. Supp. 1242 (N.D. Cal. 1972), and is included with this statement as *Appendix C*.

THIS COURT'S JURISDICTION

The appeal and this cross-appeal center on the constitutionality of the Bank Secrecy Act, and specifically those provisions requiring financial institutions to make reports and maintain certain records.

On October 18, 1972, a three-judge District Court for the Northern District of California entered an order (1) enjoining enforcement of those provisions of the Act requiring reports of certain domestic currency transactions; but (2) holding constitutional those provisions requiring banks and other financial institutions to maintain certain records, and requiring reports of various foreign financial transactions.[3]

The appellants invoke this Court's jurisdiction under 28 U.S.C. §§ 1252 and 1253. Appellee invokes this Court's jurisdiction under 28 U.S.C. § 1253. See generally, *Goldstein v. Cox*, 396 U.S. 471 (1970).

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1. The text of the Act is included with this statement as *Appendix A*.

2. The Treasury Regulations are included with this statement as *Appendix B*.

3. The order is appended to this statement as *Appendix D*.

QUESTIONS PRESENTED

The questions presented by this cross-appeal are whether the record-keeping requirements of the Bank Secrecy Act (1) violate the Fourth Amendment guarantee against unreasonable search and seizure; and whether (2) those requirements confiscate a bank asset—the assurance of customer privacy—without due process of law.

STATEMENT OF FACTS

In October, 1970, Congress enacted legislation that has come to be known as the Bank Secrecy Act.[4] The Act was adopted "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings".[5] The Act authorizes adoption of appropriate regulations by the Secretary of the Treasury.[6]

On March 31, 1972, the Treasury Secretary promulgated regulations that require prompt reports of certain financial transactions from individuals, banks and other financial institutions, and the copying and retention of virtually every writing and document that passes through the American banking system.[7]

This case came to court on June 22, 1972, with a suit by the plaintiff/appellee challenging the constitutionality of the Act and its implementing regulations, and seeking injunctive and declaratory relief. The District Court ordered consolidation with *Stark v. Connally*, U.S.D.C., N.D. Cal., No. 72-1045 WTS; convened a three-judge court[8] and

4. Public Law 91-508, 84 Stat. 114, *et seq.*
5. 31 U.S.C. § 1051. See also 12 U.S.C. § 1829b(a)(2).
6. 31 U.S.C. § 1053. See also 12 U.S.C. § 1829b(b).
7. See 31 C.F.R., Part 103.11-103.52 (1972).
8. See 28 U.S.C. § 2284.

issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions, and persons . . ."[9]

The plaintiff/appellee here joined with the plaintiffs in the *Stark* case, *supra,* in a motion for a preliminary injunction on July 17, 1972. On September 11, 1972, the three-judge court filed a memorandum decision, and entered an order on October 18, 1972, granting in part and denying in part the plaintiffs' motion. The government filed a notice of appeal to this court, and on November 16, 1972, the appellee here filed a notice of cross-appeal from that portion of the order, *supra,* denying its motion for an order enjoining enforcement, operation and execution of the record-keeping requirements of the Act.[10]

THE CROSS-APPEAL PRESENTS SUBSTANTIAL QUESTIONS

The Bank Secrecy Act makes banks and other financial institutions unwilling and unwitting diarists of their customers' financial lives. It imposes both record-keeping and reporting requirements on virtually all financial institutions.

The court below issued a preliminary injunction enjoining enforcement of the Act's reporting provisions, finding those provisions unconstitutional. The court below refused, however, to enjoin enforcement of the Act's record-keeping provisions. The latter require banks and other financial institutions to:

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9. Memorandum of Decision on Application for Temporary Restraining Order, June 30, 1972, *Stark v. Connally,* U.S.D.C., N.D. Cal., No. 72-1045 WTS, and Consolidated Case.

10. Title I and II of Public Law 91-508, 84 Stat. 1114-1124, now contained in 12 U.S.C. §§ 1730(d), 1829(b), and 1951-1959; and 31 U.S.C. §§ 1051-1062 and 1101-1122.

(1) Identify each person having an account;

(2) Identify each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any account;

(3) Identify any party not already identified for whose account any check draft or similar instrument has been received for deposit or collection; and

(4) Microfilm or otherwise reproduce any check, draft, or similar instrument either drawn on and presented to it for payment or received by it for deposit or collection.[11]

In alleged implementation of the foregoing the Secretary of the Treasury has promulgated regulations requiring banks, *inter alia,* to:

(1) Secure and maintain a taxpayer identification number for each person or legal entity maintaining an account;

(2) Secure and maintain the social security number of an individual having a financial interest in an account where one or more individuals maintain an account;

(3) Microfilm or copy each document granting signature authority or each deposit or share account;

(4) Microfilm or copy each statement, ledger card, "or other record" showing *each* transaction with respect to the account;

(5) Microfilm or copy each check, clean draft, or a money order drawn on the bank or issued by it, with exceptions under certain circumstances for accounts averaging at least 100 checks per month and which fall into certain specifically enumerated categories, such as dividend, payroll, employee and medical benefit checks;

(6) Microfilm or copy each item other than bank or periodic charges made pursuant to agreement with the customer comprising a debit to the account which

11. 12 U.S.C. § 1829b(c) and (d).

is not otherwise specifically required to be kept and which is not specifically exempted; and

(7) Microfilm or copy records prepared or received by a bank in the ordinary course of business which would be needed to reconstruct a checking account and trace a check deposited in the account through its domestic processing system or supply a description of the deposited check.[12]

Banks are required to retain the records necessary to reconstruct a checking account for two years. All of the other records described above are to be retained for five years.[13]

Banks have been ordered to make and retain the foregoing records, *inter alia,* because the Congress and the Secretary have determined that they "have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings."[14] Nowhere in the Act or regulations or in the legislative history is there any suggestion that the records are required for regulation or supervision of the banks as such. On the contrary, the Bank Secrecy Act is aimed at the banks' *customers.* The government cannot argue, for example, that copies of the fronts and backs of all checks or the records needed to reconstruct a checking account[15] are suddenly required by the Federal Deposit Insurance Corporation of the Federal Reserve Board.

The government could not hope to defend an act of Congress directing telephone companies to record and retain recordings of all telephone calls by all their various subscribers. Such an act would surely violate the Fourth Amendment right to freedom from "broad and unsuspected

12. 31 C.F.R. Part 103.34 (1972).
13. 31 C.F.R. Part 103.36(c) (1972).
14. 12 U.S.C. § 1829b(a), 31 C.F.R. Part 103.21 (1972).
15. See 31 C.F.R. Part 103.36 (a) and Part 103.34 (10) (1972).

governmental incursions into conversational privacy". *U.S. v. U.S.D.C., E.D. Mich.*, ... U.S. ....., 92 S.Ct. 2125, 2135 (1972). Checking accounts record a citizen's activities, opinions, and beliefs as fully as transcripts of his telephone conversations. The right to be protected is the same in both instances: privacy.

The record-keeping requirements of the Act exist for the sole purpose of the reporting requirements enjoined by the Court below. As such, the Act's record-keeping provisions are infected with the same malady—unreasonableness.

Finally, it is of course well-established that "the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired." *Highland v. Russell Car and Snow Plow Co.*, 279 U.S. 253, 261 (1929). This right to enter into contractual relations respecting personal affairs is protected by the due process clause of the Fifth and Fourteenth Amendments. *Allegeyer v. Louisiana*, 165 U.S. 578, 591 (1897); *Adair v. United States*, 208 U.S. 161, 174 (1908); *Coppage v. Kansas*, 236 U.S. 1, 14 (1914); *Adkins v. Childrens Hospital*, 261 U.S. 525, 546 (1923). Congress may, of course, regulate the making and performance of contracts "whenever necessary to effect any of the great purposes for which the national government was created." *Highland v. Russell Car and Snow Plow Co., supra*, at 261. But there can be no suggestion here that the Bank Secrecy Act is an aid of national defense or domestic security or that any of this nation's "great purposes" would be impaired by a decision of this Court limiting required record-keeping to those documents that would ordinarily be kept by financial institutions.

The Bank Secrecy Act is said to be aimed at "petty criminals, members of the underworld, those engaging in 'white collar' crime, and income tax evaders."[16] Their apprehension, however desirable, would not seem to be one of this nation's "great purposes," and cannot justify the invasion of privacy entailed in the record-keeping requirements of the Bank Secrecy Act.

Dated: January 8, 1973

Respectfully submitted,

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(Appendices Follow)

16. 2 Cong. and Adm. News 1970, 4395-96.

Appendix A

12 U.S.C. § 1829b.

§ 1829b. *Retention of records by insured banks—Congressional findings and declaration of purpose*

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Rules and Regulations

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

Identity of persons having accounts and persons authorized to act with respect to such accounts; exemptions

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual author-

ized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

Reproduction of checks, drafts, and other instruments; records of transactions; identity of party

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

Identity of persons making transactions reportable under the Currency and Foreign Transactions Reporting Act

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

Additions to or substitutes for required records

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

Retention period

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

Report to Congress by Secretary of the Treasury

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

Sept. 21, 1950, c. 967, § 2[21], as added Oct. 26, 1970, Pub. L. 91-508, Title I, § 101, 84 Stat. 1114.

U.S.C. § 1951-1959.

§ 1951. *Congressional findings and declaration of purpose*

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 1953(b) of this title have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 1952 of this title may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree

of usefulness in criminal, tax, or regulatory investigations or proceedings.

Pub.L. 91-508, Title I, § 121, Oct. 26, 1970, 84 Stat. 1116.

§ 1952. *Reports on ownership and control*

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

Pub.L. 91-508, Title I, § 122, Oct. 26, 1970, 84 Stat. 1116.

§ 1953. *Recordkeeping and Procedures*

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) of this section, any records or evidence of any type which the Secretary is authorized under section 1829b of this title to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a sep-

arate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

Pub.L. 91-508, Title I, § 123, Oct. 26, 1970, 84 Stat. 1116.

§ 1954. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

Pub.L. 91-508, Title I, § 124, Oct. 26, 1970, 84 Stat. 1117.

§ 1955. *Civil penalties*

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title I, § 125, Oct. 26, 1970, 84 Stat. 1117.

§ 1956. *Criminal penalty*

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Pub.L. 91-508, Title I, § 126, Oct. 26, 1970, 84 Stat. 1118.

§ 1957. *Additional criminal penalty in certain cases*

Whoever willfully violates any regulation under this chapter, section 1829b of this title, or section 1730d of this title, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title I, § 127, Oct. 26, 1970, 84 Stat. 1118.

§ 1958. *Compliance*

The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and sections 1730d and 1829b of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

Pub.L. 91-508, Title I, § 128, Oct. 26, 1970, 84 Stat. 1118.

§ 1959. *Administrative procedure*

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 1829b of this title, and section 1730d of this title.
Pub.L. 91-508, Title I, § 129, Oct. 26, 1970, 84 Stat. 1118.

31 U.S.C. § 1051-1122.

§ 1051. *Congressional declaration of purpose*

It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.
Pub.L. 91-508, Title II, § 202, Oct. 26, 1970, 84 Stat. 1118.

§ 1052. *Definitions and rules of construction*

(a) The definitions and rules of construction set forth in this section apply for the purposes of this chapter.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this chapter generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 1813 of Title 12;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 1724 of Title 12;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this chapter to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision

wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this chapter or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5.

(k) For the purposes of section 1001 of Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this chapter to which the regulation relates.

Pub.L. 91-508, Title II, § 203, Oct. 26, 1970, 84 Stat. 1118.

§ 1053. *Regulations*

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this chapter. Pub.L. 91-508, Title II, § 204, Oct. 26, 1970, 84 Stat. 1120.

§ 1054. *Compliance*

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this chapter. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues. Pub.L. 91-508, Title II, § 205, Oct. 26, 1970, 84 Stat. 1120.

§ 1055. *Exemptions*

The Secretary may make such exemptions from any requirement otherwise imposed under this chapter as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.
Pub.L. 91-508, Title II, § 206, Oct. 26, 1970, 84 Stat. 1120.

§ 1056. *Civil penalty*

(a) For each willful violation of this chapter, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this chapter, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title II, § 207, Oct. 26, 1970, 84 Stat. 1120.

§ 1057. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this chapter, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this chapter or any order of the Secretary made in pursuance thereof.

Pub.L. 91-508, Title II, § 208, Oct. 26, 1970, 84 Stat. 1120.

§ 1058. *Criminal penalty*

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Pub.L. 91-508, Title II, § 209, Oct. 26, 1970, 84 Stat. 1121.

§ 1059. *Additional criminal penalty in certain cases*

Whoever willfully violates any provision of this chapter where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title II, § 210, Oct. 26, 1970, 84 Stat. 1121.

§ 1060. *Immunity of witnesses*

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this chapter before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Pub.L. 91-508, Title II, § 211, Oct. 26, 1970, 84 Stat. 1121.

§ 1061. *Availability of information to other Federal agencies*

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this chapter available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

Pub.L. 91-508, Title II, § 212, Oct. 26, 1970, 84 Stat. 1121.

§ 1062. *Administrative procedure*

Subject to section 1052(j) of this title, the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5, shall apply to all proceedings under this chapter.

Pub.L. 91-508, Title II, § 213, Oct. 26, 1970, 84 Stat. 1121.

Subchapter II.—Domestic Currency Transactions

§ 1081. *Reports*

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Pub.L. 91-508, Title II, § 221, Oct. 26, 1970, 84 Stat. 1122.

§ 1082. *Persons required to file reports*

The report of any transaction required to be reported under this subchapter shall be signed or otherwise made both by the domestic financial institution involved

and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

Pub.L. 91-508, Title II, § 222, Oct. 26, 1970, 84 Stat. 1122.

§ 1083. *Reporting procedure*

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this subchapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this chapter, or section 1730d or 1829b of Title 12.

(b) Any person (other than an institution designated under subsection (a) of this section) required to file a report under this subchapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except that (1) if the institution is not designated under subsection (a) of this section, the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) of this section shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Pub.L. 91-508, Title II, § 223, Oct. 26, 1970, 84 Stat. 1122.

Subchapter III.—Reports of Exports and Imports of Monetary Instruments

§ 1101. *Reports—Persons required to file*

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed reports

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

Common carriers

(c) Subsection (a) of this section does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.
Pub.L. 91-508, Title II, § 231, Oct. 26, 1970, 84 Stat. 1122.

§ 1102. *Forfeiture*

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.
Pub.L. 91-508, Title II, § 232, Oct. 26, 1970, 84 Stat. 1123.

§ 1103. *Civil liability*

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 1101 of this title, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required

to be filed. The liabilities imposed by this subchapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 1102 of this title. Pub.L. 91-508, Title II, § 233, Oct. 26, 1970, 84 Stat. 1123.

§ 1104. *Remission of forfeiture or penalty*

The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just. Pub.L. 91-508, Title II, § 234, Oct. 26, 1970, 84 Stat. 1123.

§ 1105. *Enforcement authority*

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 1101 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Pub.L. 91-508, Title II, § 235, Oct. 26, 1970, 84 Stat. 1123.

§ 1121. *Records and reports*

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

Pub.L. 91-508, Title II, § 241, Oct. 26, 1970, 84 Stat. 1124.

§ 1122. *Classifications and requirements*

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 1121 of this title.

(2) The foreign country or countries as to which any requirement imposed under section 1121 of this

title applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 1121 of this title.

(4) Types of transactions subject to or exempt from any requirement imposed under section 1121 of this title.

(5) Such other matters as he may deem necessary to the application of this subchapter.

Pub.L. 91-508, Title II, § 242, Oct. 26, 1970, 84 Stat. 1124.

Appendix B

31 C.F.R. § 103

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 *Meaning of Terms*

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 *Determination by the Secretary*

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22. *Reports of Currency Transactions*

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemp-

tion contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 *Report of Transportation of Currency or Monetary Instruments*

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to cur-

rency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 *Reports of Foreign Financial Accounts*

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 *Filing of Reports*

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 *Identification Required*

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taypayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 *Determination by the Secretary*

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 *Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts*

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such ac-

count. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 *Records to be Made and Retained by Financial Institutions*

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 *Additional Records to be Made and Retained by Banks*

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim

checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to

reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 *Additional Records to be Made and Retained by Brokers and Dealers in Securities*

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a

domestic financial institution, from any person, account or place outside the United States.

§ 103.36 *Nature of Records and Retention Period*

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 *Person Outside the United States*

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic

account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 *Dollars as Including Foreign Currency*

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 *Photographic or Other Reproductions of Government Obligations*

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 *Availability of Information*

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding

in connection with which the information is sought, and the official need therefor.

§ 103.44 *Disclosure*

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 *Exceptions, Exemptions, Modifications, and Reports*

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 *Enforcement*

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured

savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 *Civil Penalty*

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 *Forfeiture of Currency or Monetary Instruments*

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 *Criminal Penalty*

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 *Enforcement Authority with respect to Transportation of Currency or Monetary Instruments*

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 *Effective Date*

This part shall become effective July 1, 1972.

Appendix C

Appendix C

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United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

MEMORANDUM OF DECISION

Before: *HAMLIN,* Circuit Judge, EAST and SWEIGERT, District Judges*

SWEIGERT, J.

Plaintiffs in No. 72 1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72 1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

*Judge Hamlin dissents in part.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051-1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. subpart C, Secs. 103.31-103.37. Section 1829b(b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31-103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional violation in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 1101 and 1121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21-103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

Reporting of Foreign Financial Transactions

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101 excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of

currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122).

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, these is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) at 526.) The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveillance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign

powers are involved. See, *United States v. United States District Court*, ... U.S. ..... (6/19/72) (slip opinion pp. 10-12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

Reporting of Domestic Financial Transactions

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by persons participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Transaction-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary in-

struments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made both by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm all checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction, the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further,

such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to

an unreasonable search within the meaning of the Fourth Amendment.[1]

That there is such a thing as a constitutionally protected "right of privacy" has been recognised by the Supreme Court in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) and most recently in *United States v. United States District Court* ..... U.S. ..... (June 19, 1972).[1a]

In *Katz v. United States*, supra, the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See, *Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274 U.S. 559, 563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See *Rios v. United States*, 364 U.S. 253 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that

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1. It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

1(a). See also, *Doe v. McMillan*, 442 F.2d 879 (D.C.Cir. 1971); *York v. Story*, 324 F.2d 250 (9th Cir. 1963); *Zimmermann v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936). But see, 25 F.Supp. (1938), aff'd in 105 F.2d 583, 586 (1939); *Dietmann v. Time*, 284 F.Supp. 925 (C.D.Cal. 1966); *City of Carmel v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex v. Smith*, 146 Atl. 34 (New Jersey 1969).

the public telephone has come to play in private communication."

Harlan, J., concurring at p. 360-361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States v. United States District Court*, ... U.S. ..... (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel v. Young, supra*, the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold v. Connecticut, supra*, held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrusion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the

customer's account, and (2) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detail information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such, become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs

not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz*, supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel v. Young*, supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" . . . "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold v. Connecticut, supra*, 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker, supra*, 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summons the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the bank or by the customer-taxpayer himself as an intervening third party interest whose financial transactions are involved. *Reisman v. Coplin*, 375 U.S. 440 (1964).[2]

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

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2. It is true that in *Donaldson v. United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States v. Kordell*, 397 U.S. 1, 7; and *Reisman v. Coplin*, 385 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States v. Morton Salt*, 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro v. United States*, 335 U.S. 1 (1948) at 32-33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of

particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann v. Securities & Exchange Commission*, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States v. United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel v. Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury,

testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U. S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, *whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested." (emphasis added).

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the

Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.
Dated: August 4th, 1972

O. D. Hamlin
Circuit Judge

/s/ William G. East
William G. East
District Judge

/s/ W. T. Sweigert
W. T. Sweigert
District Judge

STARK, et al. v. CONNALLY, et al.—No. 72-1045

CALIFORNIA BANKERS ASSOCIATION v. CONNALLY, et al.—No. 72-1157

HAMLIN, Circuit Judge, dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein

to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

O. D. HAMLIN

Appendix D

Filed OCT 18 1972
CHARLES J. ULFERS, CLERK

United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* – vs. – John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* – vs. – John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

ORDER GRANTING IN PART PRELIMINARY INJUNCTION

These actions having regularly come on for hearing pursuant to 28 U.S.C. §§ 2282 and 2284, F.R.Civ.P. 65, and LR 17, 114 and 117, Honorable William T. Sweigert, District Judge, Honorable William G. East, Senior District Judge and Honorable Oliver D. Hamlin, Senior Circuit Judge, presiding upon the plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss, and a memorandum of decision setting forth and specifying findings of fact and conclusions of law in accordance with F.R.Civ.P. 52 and 65(d) having been duly rendered and filed herein on September 11, 1972:

NOW, THEREFORE, in accordance with said memorandum of decision, it is hereby

(1) ORDERED that the temporary restraining order heretofore entered in this action on June 30, 1972, be and it hereby is dissolved; and it is further

(2) ORDERED that, it having been decided by the Court that certain provisions of Public Law 91-508, 84 Stat. 1114 (enacted October 26, 1970), are repugnant to Amendment IV of the Constitution of the United States—to wit: Sections 221, 222, and 223 of Chapter 2 of Title II (Short title: "Currency and Foreign Transactions Reporting Act") of said Public Law 91-508, 84 Stat. at 1122 (now contained in Sections 1081, 1082, and 1083 of Title 31. United States Code), plaintiff's motion to enjoin the enforcement, operation and execution of said specified provisions of said law is granted pending final adjudication of this action, and that defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, be and they hereby are enjoined from enforcing and from implementing by regulations under Part 103, Subparts B and D of Title 31, Code of Federal Regulations, or otherwise, the provisions contained in Sections 1081, 1082, and 1083 of Title 31, United States Code, until further order of this Court or until the adjudication of this action otherwise becomes final; and it is further

(3) ORDERED that, it having been decided by the Court that the provisions of said Public Law 91-508, other than those specifically referred to and enjoined in clause (2) above are not repugnant to any provision of the Constitution of the United States, plaintiff's motion to enjoin the enforcement, operation and execution of all other provisions of said law—to wit: those provisions of Titles I and II of said Public Law 91-508, 84 Stat. 1114-1124, now con-

tained in Sections 1730d, 1829b, and 1951 through 1959 of Title 12, United States Code, and in Sections 1051 through 1062, and 1101 through 1122 of Title 31, United States Code, is denied in all respects; and it is further

(4) ORDERED that defendants' motion to dismiss the complaint for failure to state claims upon which relief can be granted is denied without prejudice.

ORDERED in accordance with 28 U.S.C. § 2284(5) this 18th day of October, 1972, at San Francisco, California.

/s/ WILLIAM G. EAST
William G. East
Senior District Judge

/s/ W. T. SWEIGERT
William T. Sweigert
District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, AND ALL OTHER DEFENDANTS IN THE DISTRICT COURT, APPELLANTS

v.

THE CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum opinion of the district court (App., *infra*, pp. 43–61) is reported at 347 F. Supp. 1242.

JURISDICTION

This case consists of two actions, consolidated below, seeking to enjoin as unconstitutional the implementation of various provisions of Titles I and II of the Act of October 26, 1970, P.L. 91–508, 84 Stat. 1114 (hereafter the Bank Secrecy Act), and the Treasury Regu-

lations issued thereunder (31 C.F.R., Part 103). A three-judge district court, convened pursuant to 28 U.S.C. 2282, granted a preliminary injunction on October 18, 1972, restraining enforcement of a portion of Title II of the Act and the accompanying Regulations (App., *infra*, pp. 62–64). Notices of appeal were filed by the federal defendants on November 13, 1972 (App., *infra*, pp. 65–68).[1] This Court's jurisdiction is invoked under 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Sections 221–223 of the Bank Secrecy Act,[2] as implemented by Regulations,[3] which require financial institutions to file reports with the Secretary of the Treasury concerning each currency transaction involving more than $10,000, except routine transactions by established customers, violate the Fourth Amendment or other constitutional provisions.

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[1] The federal defendants had also filed notices of appeal on October 6, 1972, from the district court's memorandum opinion filed September 11, 1972 (App., *infra*, pp. 43–61), before the court had issued its order granting a preliminary injunction.

[2] Title I has no official name, but the entire Act is popularly known as the Bank Secrecy Act, due to the widespread concern with secrecy of bank accounts in the legislative proceedings accompanying its enactment. Title II of the Act of October 26, 1970, P.L. 91–508, 84 Stat. 1114, 1118, is officially entitled the Currency and Foreign Transactions Reporting Act (Section 201).

[3] 31 C.F.R. 103.22. See Treasury Regulations on Financial Recordkeeping and Reporting of Currency and Foreign Transactions, 31 C.F.R., Part 103 (37 Fed. Reg. (Part 4) 6912 (April 5, 1972)).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Bank Secrecy Act (Sections 101, 102, 121–129, 201–213, 221–223, 231–235, 241 and 242), the Regulations thereunder (31 C.F.R. 103.11, 103.21–103.26, 103–31–103.37, and 103.41–103.50), and the Trading with the Enemy Act (Section 5) are set forth in Appendix B, *infra*, pp. 69–110.

STATEMENT

This case involves suits against the Secretary of the Treasury and other federal officials to enjoin implementation of the financial recordkeeping and reporting provisions of the Bank Secrecy Act. The complainants are the California Bankers Association, an association of 158 state and national banks doing business in California; Fortney H. Stark, Jr., a bank president and customer; Security National Bank, an insured national bank; Charles C. Marson, a bank customer; the American Civil Liberties Union of Northern California, a nonprofit membership corporation that desires to keep the identities of its members and contributors in strict confidence; Fred Lieberman, an individual who expects to export monetary instruments exceeding $5,000 to places outside the United States; Edward C. Harwood, Carl Bruer, and Edward Durell, who maintain financial interests in and signature authority over one or more bank accounts in foreign countries; and sixteen unidentified additional plaintiffs (App., *infra*, pp. 25–42).

A. THE BANK SECRECY ACT AND THE REGULATIONS THEREUNDER

The declared purpose of Title I ("Financial Recordkeeping") of the Bank Secrecy Act of 1970[4] is to "require the maintenance of appropriate types of records * * * where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (Sections 101, 121). Section 101 requires each bank insured under the Federal Deposit Insurance Act to maintain records and other evidence of the identities of its customers, and to make microfilm copies of checks and similar instruments that are drawn on it and presented to it for payment, and records of such items received by it for deposit or collection. Section 123 requires similar records to be made and maintained by uninsured financial institutions, such as those in the business of redeeming checks, money orders, travelers' checks, or similar instruments.

The Act gives the Secretary of the Treasury authority to prescribe regulations to carry out the purposes of Title I (Sections 101, 102, 123). The Regulations promulgated by the Secretary under Title I set forth the types of records to be microfilmed by all financial institutions and the types of records to be microfilmed by banks (31 C.F.R. 103.33, 103.34). There is no provision in Title I or elsewhere giving the government additional authority to inspect these records, and the Amended Regulations[5] expressly provide that such

[4] Sections 101 to 129 of the Act (App., *infra*, pp. 69–75).

[5] Section 103.51, 38 Fed. Reg. 2174 (Jan. 22, 1973) (App., *infra*, p. 119).

inspection is governed by other federal law. The court below upheld the constitutionality of Title I (App., *infra*, p. 45).

Title II of the Bank Secrecy Act, Sections 201–242 (App., *infra*, pp. 76–89), deals with the reporting of currency and foreign transactions and has the same declared purpose as Title I (Section 202). Section 241 gives the Secretary of the Treasury authority to require United States citizens, residents and businessmen who have bank accounts or other relationships with foreign financial agencies to maintain records and file reports regarding these relationships. Under the Regulations, such persons must report information concerning their accounts with foreign financial agencies on their tax returns and an accompanying form (31 C.F.R. 103.24). Section 231 of the Act requires the reporting of each transportation into or out of the United States of monetary instruments exceeding $5,000 in value on any one occasion.[6] The Regulations, however, exempt from the Section 231 reporting requirement each "transfer of funds through normal banking procedures which does not involve the physical transportation of currency or

[6] Section 231 also requires a report where a person "receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States." Section 203(*l*) defines the term "monetary instruments" to include "coin and currency of the United States, and in addition, such foreign coin and currencies, and any such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates."

monetary instruments * * * " (31 C.F.R. 103.23(a)). The district court held these provisions with respect to reporting of foreign bank accounts and imports and exports of monetary instruments constitutional (App., *infra*, pp. 45–47).

The provisions of the Act held unconstitutional below and at issue here are Sections 221 and 222. Section 221 gives the Secretary authority to require reports of—

> Transactions involving any domestic financial institution * * * if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 222 provides that the Secretary may require such reports from the domestic financial institution involved or the parties to the transaction, or both.[7] Under the Regulations, however, only financial institutions must file reports, and they must do so only where the transaction involves the deposit, withdrawal, exchange or other payment of *currency*[8] in excess of $10,000. 31 C.F.R. 103.22(a).

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[7] The court also held unconstitutional Section 223, which provides that the Secretary may designate financial institutions to receive such reports. This authority has never been implemented.

[8] The term "currency" is defined in the Regulations as "The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money." The term "transaction in cur-

Form 4789 (App., *infra*, p. 121),[9] which is to be used for such reports, requires the following information with respect to reportable transactions: (1) the identity of the person who conducted the transaction; (2) the person or organization for whom the transaction was completed; (3) a description of the type of currency transaction, the amount involved, the amount in denominations of $100 or more, the date of the transaction, the type of non-United States currency involved, if any, and a description of any check involved in the transaction; (4) the type of identification presented; and (5) the identity of the financial institution filing the report. The Regulations exempt several types of currency transactions from the reporting requirement, the most important of which are transactions "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned," 31 C.F.R. 103.22(b).[10]

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rency" is defined as "A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part." 31 C.F.R. 103.11.

[9] Form 4789 is similar to Form TCR–1 (App., *infra*, p. 130), which was required to be filed for similar domestic currency transactions under 31 C.F.R., Part 102 (issued under the authority of Section 5(b) of the Trading with the Enemy Act (App., *infra*, pp. 89–91)). Part 102 was repealed effective July 1, 1972.

[10] Also exempted are transactions with Federal Reserve Banks and Federal Home Loan Banks and transactions solely with, or originated by, financial institutions or foreign banks.

Sections 201–213 of the Act contain administrative and enforcement provisions applicable to Title II generally. Section 204 gives the Secretary of the Treasury authority to prescribe regulations, while Section 206 allows him to make exemptions from the Title's provisions. Sections 207–210 provide for injunctive relief and civil and criminal penalties for violations of the Title. Section 212 gives the Secretary authority to prescribe regulations for making information received "available for a purpose consistent with the provisions of this title to any other department or agency of the Federal Government on the request of the head of such department or agency."

B. THE DECISION BELOW

On June 7 and 22, 1972, a few days before the Regulations were scheduled to go into effect on July 1, 1972, appellees brought these suits alleging that the Act violated the Fourth Amendment and other constitutional provisions. A temporary restraining order proscribing enforcement of the Act and the implementing Regulations was issued on June 29, 1972, and a three-judge district court was convened pursuant to 28 U.S.C. 2282 to hear and decide the constitutional issues raised by the complaints.

The district court unanimously upheld the constitutionality of the recordkeeping requirements of Title I and the accompanying Regulations, and the requirements of Title II and the Regulations respecting reports concerning the import and export of currency and monetary instruments and relationships with foreign financial institutions (App., *infra*, pp. 45–47). Al-

though thus upholding the provisions dealing with foreign financial transactions, the court concluded, with one judge dissenting (App., *infra*, p. 61), that the domestic currency transaction reporting requirements of Sections 221–223 are invalid under the Fourth Amendment as an overly broad intrusion into personal financial privacy (App., *infra*, pp. 47–60). In the majority's view, these provisions could authorize—although the Regulations do not do so—the Secretary to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts (App., *infra*, p. 48). The court therefore enjoined enforcement of these provisions by implementation of the Regulations issued thereunder or otherwise without reaching the question whether the currency reporting Regulations would themselves violate the Fourth Amendment and without considering the validity of these Sections under other constitutional provisions (App., *infra*, p. 60).

THE QUESTION PRESENTED IS SUBSTANTIAL

The decision below creates a serious gap in the Bank Secrecy Act that significantly impairs the statutory scheme for discovering transactions with financial institutions involving violations of criminal, tax or regulatory laws. Although the court's injunction is preliminary in form, there are no disputed facts to be resolved, essentially only issues of law are involved, and there is no reason to believe the district court will not simply adhere to the opinion below for the purposes of a final decree. This injunction is, moreover, not limited to any particular area of the country; it

is nationwide in scope and effect. Unless plenary review is granted by this Court, significant provisions of a major Act of Congress will have been nullified—and, we submit, nullified erroneously, for the district court erred not only in its conclusion that certain reporting provisions of the Act are unconstitutional, but also in its basic approach in passing upon the constitutional validity of this legislation.

1. In considering the provisions of the Act concerning domestic financial transactions, the district court entirely disregarded the implementing Regulations promulgated by the Secretary of the Treasury, which set forth the reporting and recordkeeping requirements under these statutory provisions. Although the Regulations require only financial institutions to report transactions (31 C.F.R. 103.22(a)), the court below analyzed the statutes involved as if reporting were required "by other parties to or participants in transactions with the institutions" (App., *infra*, p. 48). Although under the Regulations the transactions that financial institutions must report are only those involving "currency," as distinguished from checks and drafts or other written orders (31 C.F.R. 103.11), the court analyzed these statutory provisions as if reporting were required "not only of currency transactions but of any transaction involving any monetary instrument" (App., *infra*, p. 48). And although the Regulations direct financial institutions to report only currency transactions involving more than $10,000 (31 C.F.R. 103.22),, the court below considered the statutory provisions as if there were a requirement to report all transactions "in any amount—large or small" (App., *infra*, pp. 47–48). As a

result, instead of adjudging the constitutionality of a statutory scheme, as implemented by regulations, that requires only financial institutions to report only currency transactions involving more than $10,000, the district court considered the constitutionality of requiring financial institutions and all parties and participants in domestic transactions with these institutions to make reports of all such transactions, regardless of the monetary instrument or amount of money involved (App., *infra*, pp. 48–49).

The district court's decision to judge the Act's reporting requirements for domestic financial transactions as they might hypothetically be administered, rather than as the Regulations actually implement them, disregards the long-settled principle that in passing upon the constitutionality of legislation the courts should not decide "hypothetical controversies which may never become real." *Electric Bond Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 443. As this Court has often pointed out, "[p]assing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson* v. *Buck*, 313 U.S. 387, 402; see also *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 71–72, and cases there cited. Yet that is essentially what the court below did here.

We question whether a broad attack on an entire statute, in advance of its going into operation, and without any specific or concrete facts, is anything more than an effort to get an advisory opinion on questions

of sweeping generality. Long experience shows that questions look different when they arise on their own facts, and are presented by a party who can claim that he is really hurt. Given the manner in which the court below decided this case, it is at least doubtful whether this case now comes appropriately under the Declaratory Judgment Act as "a case of actual controversy," if it ever did. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324–326; *Electric Bond Co.* v. *Securities and Exchange Commission*, *supra*, 303 U.S. at 443; *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461–462.

2. In addition, the district court's approach in this case contravenes the rule, reiterated many times by this Court, that the words of a statute are to be read narrowly so as to avoid substantial constitutional doubts that might otherwise be presented. *E.g.*, *United States* v. *Rumley*, 345 U.S. 41, 45–46; *Schneider* v. *Smith*, 390 U.S. 17, 26–27. The court below did just the opposite: it read the language of the Act as broadly as possible, ignored the implementing Regulations, and, in the process, conjured up a host of constitutional issues that are not presented by the Act as it is presently administered—and in all probability never will be.

There is virtually no chance that the currency reporting provisions of the Act would be applied in the broad manner suggested by the court below, for such an interpretation would directly conflict with clear legislative history and would therefore be subject to challenge on non-constitutional grounds. This legislative history indicates that the currency reporting provisions were not intended to encompass all personal checks and similar instruments.

Section 221 provides for reports of transactions involving "monetary instruments," which are defined by Section 203(*l*) as—

> coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

(The Regulations limit the application of the reporting requirements of Section 221 to "currency." 31 C.F.R. 103.22.)[11] But the term "monetary instruments" in Section 221 does not, and was not intended to, include personal checks. The bill as originally introduced in the House applied only to United States currency. However, in order to close a potential loophole—avoidance of the currency reporting provisions by the use of currency equivalents—the scope of the provisions was expanded to include "monetary instruments." The House Committee noted that this term "theoretically * * * [reached] as far as personal checks," but made clear that "It is not the intention of your committee * * * that this broadened authority be expanded any further than necessary to cover those types of bearer instruments which may substitute for currency." [12] H. Rep. No. 91-975, 91st Cong.,

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[11] Section 103.11 of the Regulations does not apply to Section 103.22.

[12] Significantly, the House Committee's version of the bill was itself far broader in this respect than the more specific provisions of the statute as enacted, since it would have included within the term "monetary instruments", "such types of

2d Sess., 22; accord, *Hearings on Foreign Bank Secrecy before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency,* 91st Cong., 2d Sess., 183 [hereafter Senate Hearings].

Thus the statute is not simply susceptible to a far narrower construction than that given it by the court below; such a construction is compelled by the legislative history. Yet in this case the district court held that these provisions of the Act infringed the right of privacy of individuals in violation of the Fourth Amendment because it is reasonable "for the drawer of a check to regard himself as the real owner of his checks * * * and to expect that detailed information shown only on the face of his checks will not be automatically broadcast through the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry" (App., *infra,* p. 54). The court thus decided this case on the basis of hypothetical applications not presented in light of the Regulations and not even possible in the future in view of the legislative history of the Act that we have related.

3. In regard to appellees' Fourth Amendment claims, it must be remembered that, as presently administered, the Act requires reports only from financial institutions. Like other businesses, such institutions "can claim no equality with individuals in the enjoyment of a right to privacy." *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652; see *United States*

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checks, bills, notes, bonds, stock transferable by delivery *or other obligations or instruments as the Secretary may by regulation specify.*" H.R. (as reported to the House) 15073, 91st Cong., 1st Sess., Sec. 203(m) (emphasis added).

v. *First National Bank,* 267 U.S. 576, affirming 295 Fed. 142 (S.D. Ala.). And as Judge Learned Hand held for the court in *McMann* v. *Securities and Exchange Commission,* 87 F. 2d 377, 379 (C.A. 2), the Fourth Amendment does not forbid the government from requiring information on individual accounts from financial institutions—here the currency reports—unless the demand "is out of proportion to the end sought." Accord *Shapiro* v. *United States,* 335 U.S. 1, 32–33.

To the court below, the relationship between the reporting requirement and the need for effective law enforcement was "far-fetched" (App., *infra,* p. 58).[13] But with respect to large currency transactions—the only kind that must be reported under the Regulations—the court is mistaken. And the court is similarly mistaken in its conclusion that bank customers have a reasonable expectation that their bank will not disclose their large currency transactions.

In 1945, the Secretary of the Treasury promulgated regulations under Section 5(b) of the Trading with the Enemy Act (App., *infra,* p. 89) requiring financial institutions to report all currency transactions that, in the judgment of the institution, exceeded those "commensurate with the legitimate and customary conduct of the business, industry or profession of the person or organization concerned" (Sec. 102.1), particularly where the transaction involved $1,000 or more in denominations of $50 or more,[14] or $10,000 or

[13] The court may have intended this to apply to a requirement that all transactions, large or small, in currency or not, must be reported by financial institutions and their customers—which is not the situation here.

[14] This was raised in 1952 to $2500 in denominations of $100 or more. 17 Fed. Reg. (Part 2) 1822 (Feb. 29, 1952); 17 Fed. Reg. (Part 2) 2306 (March 18, 1952).

more in any denominations.[15] 31 C.F.R. (1949 ed.), Part 102 (10 Fed. Reg., Part 6, p. 6556 (June 5, 1945). When these regulations were revised in 1959, the Secretary noted the great value of these reports in disclosing income tax evasion by racketeers, narcotics dealers, foreign agents, and others engaged in illegal activities. In the fiscal years 1957 and 1958, for example, the Internal Revenue Service completed 129 fraud cases, involving additional tax and penalties of approximately $13,500,000, that originated from information contained in the TCR–1 currency reports. Treasury Release No. A–590, note 15, *supra.*

By 1970, the use of financial institutions, both domestic and foreign, in furtherance of criminal activities had markedly increased. H. Rep. No. 91–975, 91st Cong., 2d Sess., 10; S. Rep. No. 91–1139, 91st Cong., 2d Sess., 2–3. Congress recognized the importance of reports of large and unusual currency transactions in discovering criminal activity and desired to strengthen the statutory basis for requiring such reports. H. Rep. No. 91–975, *supra,* 11–12. In particular, Congress intended to authorize more definite standards for determining what should constitute the type of unusual transaction that must be reported. S. Rep. No. 91–1139, *supra,* 6; see *Hearings on Foreign Bank Secrecy and Bank Records before the House Committee on Banking and Currency,* 91st Cong., 1st and 2d Sess., 61 [hereafter House Hearings].

The Regulations promulgated under the Bank Secrecy Act eliminated the subjectivity of the earlier regulations by replacing the uncustomary conduct

[15] In 1959 the reporting form was simplified. Treas. Release No. A–590, August 3, 1959 (App., *infra,* p. 127).

standard with a requirement (31 C.F.R. 103.22) that each currency transaction exceeding $10,000 must be reported unless it is "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate" with the customer's business.[16]

In view of the reporting requirements dating back to 1945, bank customers cannot claim that they had expected their large currency transactions to remain secret; banks have been reporting such transactions for more than twenty-five years. Cf. *Couch* v. *United States,* No. 71–889, decided January 9, 1973, slip op. 13–14; *United States* v. *Biswell,* 406 U.S. 311, 316. And in light of this history there is no basis for the district court's belief that the reporting provisions in the Act have only a tenuous relationship to the discovery of criminal activity.

These currency transaction reporting provisions are necessary to carry out the central objective of the Bank Secrecy Act: to disclose transactions entered into for the purpose of concealing illegal sources of funds or preventing detection of their use in unlawful enterprises. To this end, Title I of the Act is aimed at requiring banks to maintain records sufficient to provide the evidence necessary for criminal, tax and regulatory investigations and proceedings, and adequate to make certain that the identity of bank customers is accurately established. H. Rep. No. 91–975, *supra,* 11; S. Rep. No. 91–1139, *supra,* at 5. However,

[16] In addition, the Regulations provide (31 C.F.R. 103.22) that the names of all customers whose currency transactions in excess of $10,000 are not reported on Form 4789 must be reported to the Treasury on demand.

the effectiveness of this provision, which the court upheld, see pp. 5, 8 *supra,* depends on whether those engaging in illegal activities use written instruments such as checks and on whether the investigatory agencies know of the financial institutions with which they deal. Reports pursuant to Title II of the Act by financial institutions of large currency transactions by non-established customers prevent underworld figures from evading the effect of the record-keeping provisions in Title I and supply leads for determining which records should be summoned or subpoenaed.

The provisions of Title II dealing with foreign financial transactions, which the court below also sustained, see pp. 6, 8 *supra,* are similarly aimed at preventing concealment of financial dealings that could be used for illegal purposes. The prime importance of secret foreign bank accounts is not simply as a depository for concealing funds, but also as a device for converting illegally acquired cash into nonsuspicious, nontraceable credit that can be imported and used in this country.[17] In order to prevent concealment of such conversions, the Regulations require that any person transporting currency in excess of $5,000 into

[17] Foreign accounts as repositories of funds are, in themselves, of little benefit to those who use them. Typically, they do not even pay interest. Rather, the objective is ordinarily to repatriate such funds to the United States in the form of "laundered or "purified" credit, one such method being to "borrow" back funds from a foreign bank on the security of funds secretly deposited therein. *See House Hearings, supra,* 17, 38, 49; *Senate Hearings, supra,* 65.

Congress was appraised of numerous and diverse purposes for which such secret foreign bank accounts have been widely used, including (1) illegal trading in gold, (2) avoiding the Securities and Exchange Commission margin requirements on the purchase of United States securities, (3) manipulating United

or out of the country on any one occasion must report the basic facts of the transaction (31 C.F.R. 103.23); a customer of a foreign financial institution must provide the Secretary with certain details of his relationship with the institution (31 C.F.R. 103.24).

The effectiveness of these latter provisions will be substantially impaired, however, if there can be secret cash deposits into, or withdrawals from, domestic financial institutions with which the customer does not ordinarily deal. Although the covert physical transportation of currency out of or into the United States constitutes a key element in effecting the conversion of cash into usable credit, there was considerable testimony before the congressional committees that domestic financial institutions are often unwittingly involved in transfers and transactions designed to accomplish one step or another in more sophisticated and complex conversion procedures. See, *e.g., House Hearings,* 25–26, 66–67, 68, 90–91; *Senate Hearings,* 280–281. To the extent that large currency transactions, which often mark the beginning or end of these conversion procedures, are not reported and remain secret, the schemes obviously become harder to detect.

States securities markets, (4) circumventing S.E.C. restrictions on insider trading, (5) concealing (and "purifying") the fruits of illegal activity, such as smuggling and marketing dangerous drugs, (6) receiving bribes or illegal kickbacks on government contracts, (7) evading United States taxes by concealing income (such as "skim" from otherwise legal gambling operations) or the realization of income (*e.g.*, on the sale of securities held through a foreign bank), and (8) payment of foreign agents engaged in espionage activities within the United States or dealing with United States personnel. See House Hearings, *supra*, pp. 10–14, 18–28, 49–50, 64–68, 91, 119–123, 128–131; Senate Hearings, *supra*, pp. 65, 66, 68, 71–72, 86–90.

In short, the decision below creates a serious loophole in the statutory scheme and does so on the basis of the court's view, contrary to the historical background of this legislation and at odds with congressional findings, that there is little relationship between the currency reporting requirements and the detection of illegal activity—a view that the court arrived at by disregarding the fact that the implementing Regulations apply only to the kinds of transactions that were at the core of congressional concern when the Act was passed.

4. Since the court below improperly ignored the Regulations, as we have discussed above, pp. 10–14, *supra*, much—if not all—of the portion of its opinion regarding the effect of the reporting provisions on the privacy of individuals deals with issues that are not presented. For example, the intrusion on privacy that would result from requiring banks and individuals to report all banking transactions involving personal checks appears to be the primary reason that the district court held that these provisions violate the Fourth Amendment (App., *infra*, pp. 53–54), yet there presently is no such reporting requirement under the Act and, as we pointed out above, pp. 11–14, *supra*, never could be.[18]

[18] The testimony of the government officials concerning possibly overly broad check microfilming requirements (*House Hearings*, 68; *Senate Hearings*, 178), which the district court quoted (App., *infra*, pp. 58–59), was addressed to improving the recordkeeping statutes, not the currency reporting provisions that the court held unconstitutional. The statute as finally enacted corrected the problems referred to by the Treasury officials by giving the Secretary discretionary authority to limit the scope of the recordkeeping requirements. See S. Rep No. 91–1139, *supra*, 18–19 (supplemental views).

As presently administered, all that the Act requires in this regard is that financial institutions report large currency transactions. Similar requirements have been in existence for more than twenty-five years. The intrusion on privacy is limited to transactions that hold the greatest potential for criminal activity and, in light of the long history of the reporting of large currency transactions, individual bank customers can scarcely contend that they expected that financial institutions would not disclose such transactions. Indeed, the district court itself observed "that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination" (App., *infra*, pp. 52–53). See *Donaldson* v. *United States*, 400 U.S. 517, 522; *Couch* v. *United States*, No. 71–889, Oct. Term 1972, decided January 9, 1973.

After stating this, however, the court pointed to the lack of "procedural safeguards with respect to reporting of domestic transactions," such as those contained in the laws governing a tax summons in Sections 7602–7608 of the Internal Revenue Code (App., *infra*,

pp. 55–56). For a customer of a financial institution, however, the intervention procedures in tax summons cases described in *Donaldson* v. *United States,* 400 U.S. 517, would be virtually meaningless: his very act challenging the transmission of the currency report would disclose the sketchy information that the report requires. Moreover, since the reports are applicable to such a narrow class of transactions, it is difficult to see how a customer could ever make out a case for intervention under the *Donaldson* requirements, 400 U.S. at 530–531. As to the financial institutions, they could obtain judicial review of the reporting provisions by refusing to transmit the reports and then challenging the demand therefor in an enforcement proceeding, cf. *Reisman* v. *Caplin,* 375 U.S. 440, 446–449; *United States* v. *Ryan,* 402 U.S. 530, 532–534, although it is difficult to see what objection they would have to the present currency reporting requirements. In addition, under Section 213 of the Bank Secrecy Act (App., *infra,* p. 82) any change in the Regulations is subject to the procedural and judicial review provisions of the Administrative Procedure Act.[19]

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[19] Plaintiffs below, and apparently the district court (App., *infra,* p. 49), expressed concern regarding 31 C.F.R. 103.45, which allows the Secretary "by written order or authorization [to] make exceptions to, grant exemptions from, *impose additional record keeping or reporting requirements authorized by statute, or otherwise [to] modify*" the Regulations without formal amendments. Section 103.45 has now been amended, however, eliminating the italicized phrase in order to make clear that no additional requirements may be imposed except by formal amendment of the Regulations. See App., *infra,* p. 119.

In short, neither financial institutions nor their customers engaging in large currency transactions have a valid claim that the reporting of such transactions violates the Fourth Amendment's prohibition against unreasonable searches and seizures or any right to privacy emanating therefrom. The district court erred in holding otherwise—an error that stemmed in substantial part from its refusal to consider the Act in light of the Regulations and its insistence on interpreting each of the reporting provisions as broadly as the language could bear.

5. Plaintiffs raised other constitutional claims not reached by the district court. Relying on cases such as *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, they contended that the currency reporting provisions violate their right to freedom of association under the First Amendment. But their argument assumes that the Secretary will require reports of all checks and similar items used by membership organizations, and that such information might be used to suppress certain organizations. Plaintiffs did not claim, however, that membership organizations engage in the large currency transactions that must actually be reported under the Regulations and for that reason alone their contention should be rejected. It is, moreover, unlikely that they would engage in such transactions and still more improbable that reports of such activity could or would be used to impinge upon the First Amendment rights of their members.

Plaintiffs' further contention that these statutes deprive bank customers of their privilege against self-incrimination under the Fifth Amendment is

unfounded. Cases such as *Marchetti* v. *United States*, 390 U.S. 39, which struck down the registration requirement of the gambling tax statutes, are not in point here, since the Regulations require only the financial institution, not the person who engages in the large currency transaction, to file the report. See *Perlman* v. *United States*, 247 U.S. 7, 15; *Burdeau* v. *McDowell*, 256 U.S. 465; cf. *Couch* v. *United States*, No. 71–889, Oct. Term, 1972, decided January 9, 1973. Even if the reports were required of the customers of financial institutions, which is not the case, they could properly assert their Fifth Amendment claim only in an action to compel them to make a report, not in a declaratory judgment action such as this. *Haynes* v. *United States*, 390 U.S. 85, 99; *Bowes* v. *Commission to Investigate Allegations of Police*, 330 F. Supp. 262 (S.D. N.Y.).

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

LEONARD J. HENZKE, JR.,
GARY R. ALLEN,
Attorneys.

FEBRUARY 1973.

APPENDIX A

United States District Court for the Northern District of California

NO. —

THE CALIFORNIA BANKERS ASSOCIATION, PLAINTIFF

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; GEORGE P. SHULTZ, SECRETARY-DESIGNATE OF THE TREASURY; WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY; MYLES J. AMBROSE, COMMISSIONER OF CUSTOMS; JOHNNIE M. WALTERS, COMMISSIONER OF THE INTERNAL REVENUE SERVICE; HERMAN NICKERSON, JR., ADMINISTRATOR OF THE NATIONAL CREDIT UNION; THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; THE FEDERAL HOME LOAN BANK BOARD; THE FEDERAL DEPOSIT INSURANCE CORPORATION; AND THE SECURITIES AND EXCHANGE COMMISSION, DEFENDANTS

PHILIP E. DIAMOND,
JOHN M. ANDERSON,
EDGAR B. WASHBURN,
LANDELS, RIPLEY & DIAMOND,
San Francisco, California 94104
Attorneys for Plaintiff,
The California Bankers Association.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

JURISDICTION AND VENUE

1. This is an action for injunctive and declaratory relief to prevent enforcement of an Act of Congress

and regulations promulgated pursuant to that Act. This Court has jurisdiction under 5 U.S.C. 500 et. seq.; 5 U.S.C. 701–706; and 28 U.S.C. 1331, 1332, 1346, 1348, 1349, 1361, 2201, and 2282. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. Each of the defendants has performed or threatens to perform the acts alleged in this complaint within the Northern District of California, and the plaintiff's claim arises in this District. Pursuant to 28 U.S.C. 1391, venue is proper in this District.

PARTIES

3. The plaintiff, California Bankers Association, is an unincorporated association consisting of 158 state and national banks doing business in the State of California. The member banks of the plaintiff are referred to as "the members." Each member maintains many thousands of accounts and is involved in numerous transactions daily which fall within the provisions of the Act of Congress and regulations under attack herein. If such Act and regulations are permitted to become effective, compliance by the members will cost them many thousands of dollars per year and inflict upon them the irreparable injury hereafter described. Alternatively, failure of members to comply with the Act and regulations will subject them to substantial civil and criminal penalties.

4. Defendant John B. Connally, Jr., is the Secretary of the Treasury of the United States, and is referred to in this complaint as "the Secretary." Defendant Charles Shultz has been nominated Secretary of the Treasury, subject to confirmation by the United States Senate. Defendants Connally and Shultz are charged with the duty and responsibility of enforcing the Act and regulations which are the subject of this complaint.

5. Defendant William B. Camp is Comptroller of the Currency; defendant Myles J. Ambrose is Commissioner of Customs; defendant Johnnie M. Walters is Commissioner of the Internal Revenue Service; defendant Herman Nickerson, Jr., is Administrator of the National Credit Union. Defendants Camp, Ambrose, Walters, Nickerson, and the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission are charged under the Act and regulations with the duty and responsibility of enforcing the Act and regulations in question.

CLAIM FOR RELIEF

6. In 1970 the Congress of the United States enacted and the President of the United States signed into law Public Law 91–508, 84 Stat. 114 *et seq.*, 31 U.S.C. § 1051 *et seq.*, referred to in this complaint as "the Act."

7. In April, 1971, purportedly pursuant to the authority granted to him by the Act, the Secretary of the Treasury promulgated certain regulations adding Part 103 to the Code of Federal Regulations, referred to hereinafter as "the regulations." These regulations are, unless otherwise enjoined, to become effective July 1, 1972.

8. The Act and regulations require that the plaintiff's members affirmatively and promptly report to the Secretary, in addition to other transactions, the following:

(a) The transportation by plaintiff's members of monetary instruments having a value of more than $5,000.00 into or out of the United States;

(b) Each deposit, withdrawal, or exchange of currency or other payment by, through, or to one

of plaintiff's members which involves a transaction in currency of more than $10,000; except that the members are not required to report transactions with an established customer which it reasonably concludes does not exceed in its currency transactions amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.

9. The Act and regulations further require that the members retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) The front and back of all checks and money orders drawn on it; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criteria are exempt;

(b) Records of each transaction involving a checking or savings account;

(c) Records of each extension of credit of more than $5,000 not secured by real property;

(d) Records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

10. The reporting and record keeping requirements under the Act and regulations may be modified or expanded at the will of the Secretary under C.F.R. 103.45(a), which provides, in part, as follows:

> The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise

modify the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes or persons, and may apply to particular transactions or classes of transactions.

The aforesaid discretionary power to modify or expand the requirements threatens to deprive members of their constitutional right of due process and equal protection under the Fifth Amendment of the United States Constitution and is a void delegation of legislative power and/or an excessive exercise of legislative power previously delegated in contravention of Article I of the United States Constitution. The foregoing regulation likewise purports to authorize the Secretary to modify or expand the regulations without complying with the procedure specified by the Administrative Procedure Act (5 U.S.C. 500 *et. seq.*).

11. Each member maintains a close business relationship with its depositors and customers which is founded upon the member maintaining the confidential nature of its depositors' and customers' business transactions. Compliance with the provisions of the Act and regulations described herein will prevent members from maintaining such confidence thereby destroying the business relationship that exists. The destruction of such business relationship will cause members to sustain irreparable injury by virtue of losing significant numbers of customers and depositors as well as losing the good will and confidence essential to the operation of a bank. Such injury will deprive members of their property without due process of law and denies members the equal protection of the laws guaranteed to them under the Fifth Amendment to the United States Constitution.

12. If the Act and regulations are permitted to

become effective, members will be forced to act as agents of and co-conspirators with defendants for the purpose of: (a) illegally violating depositors' and customers' right of privacy; (b) abridging depositors' and customers' freedom of speech and assembly as guaranteed by the First Amendment of the United States Constitution; (c) engaging in unreasonable searches and seizures in contravention of the Fourth Amendment to the United States Constitution; and (d) depriving depositors and customers of the due process of laws, equal protection of the laws and abridging their privileges and immunities in violation of the Fifth and Fourteenth Amendments of the United States Constitution. As a direct and proximate result, members will be exposing themselves to potential liability from such depositors and customers thereby depriving members of their property without due process of laws and denying them the equal protection of the laws as guaranteed by the Fifth Amendment of the United States Constitution.

13. A number of customers and depositors of members are religious, political and controversial entities or members of such entities to whom the freedom of speech and association is protected under the First Amendment. Such customers and depositors are often the targets of official surveillance because of the unorthodoxy of their beliefs. Disclosure of the information called for by the Act and regulations is a method of implementing such surveillance. Members are illegally being required by the scheme of governmental surveillance encompassed within the Act and regulations to be the perpetrators of illegal searches and seizures as well as a co-conspirator with the government in suppressing the freedom of speech and assembly and the civil rights of such customers and depositors.

14. The plaintiff's members have no plain, speedy or adequate remedy at law. If this Court does not enjoin defendants as hereinafter prayed, the plaintiff and the members will immediately and irreparably suffer injury as alleged.

15. An actual controversy exists between the plaintiff and the defendants. The plaintiff believes and alleges that the Act and regulations are unconstitutional, null and void in their entirety in that they violate Article I and the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution. At the same time, the plaintiff is informed and believes, and, based upon such information and belief, alleges that defendants contend that the Act and regulations are legal and constitutional in all respects.

WHEREFORE, the plaintiff prays that this court:

1. Issue preliminary and permanent injunctions enjoining and preventing defendants and their agents, servants, employees, representatives and successors from enforcing any of the provisions of the Act and regulations in dispute herein;

2. Issue a declaratory judgment declaring the Act and regulations in dispute herein unconstitutional, null and void in their entirety as being repugnant to Article I and the First, Fourth, Fifth, Ninth and Tenth Amendments to the United States Constitution.

3. Grant plaintiff its costs of suit; and

4. Grant such other and further relief as may be just and proper.

PHILIP E. DIAMOND,
JOHN M. ANDERSON,
EDGAR B. WASHBURN,
LANDELS, RIPLEY & DIAMOND,

By PHILIP E. DIAMOND,
Attorneys for Plaintiff.

Dated: JUNE 22, 1972.

United States District Court
Northern District of California

(No. C–72–1045–WTS)

(First Amended Complaint)

FORTNEY H. STARK, JR., SECURITY NATIONAL BANK, CHARLES C. MARSON, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, INC., FRED LIEBERMAN, EDWARD C. HARWOOD, CARL BRUER, EDWARD DURELL, AND DOES FIVE THROUGH TWENTY, INCLUSIVE, PLAINTIFFS

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY, GEORGE P. SHULTZ, SECRETARY-DESIGNATE OF THE TREASURY, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, MYLES J. AMBROSE, COMMISSIONER OF CUSTOMS, JOHNNIE M. WALTERS, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, HERMAN NICKERSON, JR., ADMINISTRATOR OF THE NATIONAL CREDIT UNION, THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL HOME LOAN BANK BOARD, THE FEDERAL DEPOSIT INSURANCE CORPORATION, THE SECURITIES AND EXCHANGE COMMISSION, AND DOES TWENTY-ONE THROUGH FORTY, INCLUSIVE, DEFENDANTS.

HENRY RAMSEY, JR.,
CHARLES C. MARSON,
PETER SHEEHAN,
American Civil Liberties Union Foundation of Northern California, Inc.,
San Francisco, California 94105

NEIL HORTON,
DEENE SOLOMON,
Oakland, California 94612
Attorneys for Plaintiffs.

Plaintiffs allege:

I

This is an action for injunctive, mandamus, and declaratory relief to prevent the enforcement of an Act of Congress, and Regulations promulgated thereunder, which require the reporting of certain financial transactions and the making and retention of copies of checks and records by banks, other financial institutions, and individuals. This Court has jurisdiction under Title 5, U.S.C., Sections 701–06, and Title 28, U.S.C., Sections 1331, 1332, 1346, 1348, 1349, 1361, 2201, and 2282, as hereinafter more fully alleged.

II

In 1970 the Congress of the United States enacted and the President of the United States signed into law Public Law 91–508, 84 Stat. 1114 et seq., referred to hereinafter as "the Act."

III

In April, 1971, purportedly pursuant to the authority granted to him by the Act, the Secretary of the Treasury promulgated certain regulations adding Part 103 to the Code of Federal Regulations, referred to hereinafter as "the Regulations." Said Regulations will become effective July 1, 1972.

IV

Plaintiff Fortney H. Stark, Jr., is the President of the Security National Bank and a customer of and depositor therein, and a resident of the judicial district of the United States District Court for the Northern District of California.

V

Plaintiff Security National Bank is a duly chartered, insured and operating national bank, with its principal office in Walnut Creek, California.

VI

Plaintiff Charles C. Marson is a resident of Berkeley, California, a customer of and depositor in the Bank of America, a duly chartered, insured and operating national bank with its principal office in San Francisco, California.

VII

Plaintiff American Civil Liberties Union of Northern California, Inc., is a non-profit membership corporation organized under the laws of the State of California, with its principal office in San Francisco, California, which is dedicated solely to the preservation and advancement of the guarantees of individual liberties found in the United States Constitution and the Bill of Rights through litigation, legislation and education. Plaintiff American Civil Liberties Union of Northern California, Inc. is regarded by many as a controversial organization. Plaintiff American Civil Liberties Union of Northern California, Inc. desires, and its members desire, to maintain the identities of its members and contributors in strict confidence.

VII–A

Plaintiff Fred Lieberman is a resident of Elkins Park, Pennsylvania. Plaintiff Edward C. Harwood is a resident of Barrington, Massachusetts. Plaintiff Carl Bruer is a resident of Princeton, New Jersey, Plaintiff Edward Durell is a resident of Columbus, Ohio.

VII–B

Plaintiff Lieberman has repeatedly in the recent past transported, mailed or shipped, or caused to be transported, mailed or shipped, one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States, and expects to have reason to do so again in the near future. Plaintiff Lieberman objects to those portions of the Act and Regulations that require him to report such transactions because he regards such requirements as unconstitutional, for the reasons more fully alleged hereinafter.

VII–C

Plaintiffs Lieberman, Harwood, Bruer and Durell each maintain a financial interest in and signature authority over one or more bank accounts in foreign countries. Each of said plaintiffs objects to those portions of the Act and Regulations that require him to report such interest and authority to the Government because he regards the such requirements as unconstitutional, for the reasons more fully alleged hereinafter.

VIII

Plaintiffs do not now know the names or capacities of plaintiffs Doe Five through Doe Twenty, inclusive, and will amend this Complaint as soon as the names and capacities of said Plaintiffs are ascertained.

IX

Defendant John B. Connally, Jr. is the Secretary of the Treasury of the United States (hereinafter referred to as "the Secretary"). Defendant Charles Shultz has been appointed as Secretary of the Treas-

ury, subject to confirmation by the United States Senate. Defendants Connally and Shultz are charged with the duty and responsibility of enforcing the Act and Regulations.

X

Defendant William B. Camp is Comptroller of the Currency; defendant Myles J. Ambrose is Commissioner of Customs; defendant Johnnie M. Walters is Commissioner of the Internal Revenue Service; defendant Herman Nickerson, Jr. is Administrator of the National Credit Union. Defendants Camp, Ambrose, Walters, Nickerson, and the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission are charged under the Act and Regulations with the duty and responsibility of enforcing the Act and Regulations.

XI

Plaintiffs do not now know the names or capacities of Defendants Doe Twenty-One through Doe Forty, inclusive, and will amend this Complaint as soon as the names and capacities of said Defendants are ascertained.

XII

The Act and Regulations require that Plantiff Security National Bank affirmatively and promptly report to the Secretary, in addition to other transactions, the following:

a. the transportation by it of a monetary instrument having a value of more than $5,000.00 into or out of the United States;

b. each deposit, withdrawal, exchange of currency or other payment by, through, or to Security National Bank which involves a transaction

in currency of more than $10,000.00; except that plaintiff Security National Bank is not required to report transactions with an established customer which it reasonably concludes does not exceed in its currency transactions amounts commensurate with the customary business practice of the customer, unless otherwise directed in writing by the Secretary of the Treasury.

XIII

The Act and Regulations further require that plaintiff Security National Bank retain either the original or a microfilm or other copy or reproduction of each of the following:

a. the front and back of all checks and money orders drawn on it; except checks on accounts which can be expected to have drawn on them an average of at least 100 checks per month per calendar year or per occasion for the issuance of checks and which meet certain other specific criteria are exempt;

b. records of each transaction involving a checking or savings account;

c. records of each extension of credit of more than $5,000.00 not secured by real property;

d. records sufficient to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check.

XIV

The reporting and recordkeeping requirements under the Act and Regulations may be modified or expanded at the will of the Secretary under C.F.R. 103.45(a), which provides, in part, as follows:

The Secretary, in his sole discretion, may by

written order or authorization make exceptions to, grant exemptions from, impose additional record keeping or reporting requirements authorized by statute, or otherwise modify the requirements of this part. Such exceptions, exemptions, requirements or modfications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions.

XV

If the Act and Regulations are permitted to become effective, plaintiff Security National Bank will be forced to violate good banking practice and its customers' right of privacy and confidentiality in their financial and personal affairs and as a direct and proximate result thereof will lose significant numbers of its customers and substantial deposits. The monetary damage to plaintiff Security National Bank as a direct and proximate result of the implementation of the Act and Regulations will be in excess of $10,000.00.

XVI

Plaintiff American Civil Liberties Union of Northern California, Inc. maintains accounts in the Wells Fargo Bank and Trust Company at its Market-Montgomery Street branch in the City and County of San Francisco.

The Act and Regulations provide that the Secretary may make any information set forth in any reports received by him pursuant to the Regulations available to any other department or agency of the United States upon the written request of the head of such department or agency.

The Federal Bureau of Investigation is such an agency of the United States.

Neither the Act nor the Regulations provide that information received from the Secretary by a department or agency of the United States must be maintained confidentially.

As heretofore alleged by plaintiff Security National Bank, the Regulations may be modified or expanded at the will of the Secretary and said modifications or expansions may be made to apply to particular persons or to particular classes of persons.

If the Act and Regulations are permitted to become effective, plaintiff American Civil Liberties Union of Northern California, Inc. will no longer be able to reasonably and effectively maintain the anonymity of its members and contributors and as a direct and proximate result thereof will lose significant numbers of its members and substantial contributions. The monetary damage to plaintiff American Civil Liberties Union of Northern California, Inc. as a direct and proximate result of the implementation of the Act and Regulations will be in excess of $10,000.00.

XVII

Plaintiff Stark is a depositor in plaintiff Security National Bank and, as heretofore alleged, plaintiff Marson is a depositor in the Bank of America.

If the Act and Regulations are permitted to become effective, plaintiffs Stark and Marson's contributions and dues to organizations and associations may be easily and simply determined by the Secretary or his designate from information required to be maintained and reported pursuant to the Regulations and as a direct and proximate result thereof plaintiffs Stark and Marson will suffer a chilling effect upon their right of association as guaranteed by the First Amendment to the United States Constitution and an abridgment of their constitutional right of privacy.

If the Act and Regulations are permitted to become effective:

a. the information required to reconstruct plaintiffs Stark and Marson's demand deposit accounts and to trace any check deposited in such accounts through the banks' domestic processing systems must be maintained and is subject to seizure, without notice to plaintiffs Stark or Marson, by written order of the Secretary;

b. plaintiffs Stark and Marson's banks must maintain the original or reproduce each statement, ledger card or other record concerning their respective deposit accounts, showing each transaction in, or with respect to, that account and such records are subject to seizure, without notice to plaintiffs Stark or Marson, by written order of the Secretary; and

c. plaintiffs Stark and Marson's banks must maintain the original or reproduce each check or money order drawn from their respective deposit accounts and submit the same to the Secretary, without notice to plaintiffs Stark or Marson, upon written order of the Secretary.

As a direct and proximate result thereof, plaintiffs Stark and Marson's right to be free from unreasonable searches and seizures under the Fourth Amendment of the United States Constitution will be violated.

XVII–A

If the Act and Regulations are permitted to become effective, plaintiff Lieberman will be forced to report to the Government the details of each transaction in which he transfers a monetary instrument of a value in excess of $5,000 from a place inside the United States to a place outside the United States.

As a direct and proximate result thereof plaintiff Lieberman's right to be free of unreasonable seizures and his right to privacy will be violated.

XVII–B

If the Act and Regulations are permitted to become effective, plaintiffs Lieberman, Harwood, Bruer and Durell will each be forced to report to the Government his financial interest in and signature authority over his bank account or accounts in foreign countries. As a direct and proximate result thereof said plaintiffs' rights to be free of unreasonable seizures and rights of privacy will be violated.

XVIII

Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of law. If this Court does not enjoin defendants as hereinafter prayed, plaintiffs will immediately and irreparably suffer injury as hereinbefore alleged.

XIX

An actual controversy exists between plaintiffs and defendants. Plaintiffs believe and allege that the Act and Regulations are unconstitutional, null and void in their entirety because they violate the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. Plaintiffs are informed and believe and, based upon such information and belief, allege that defendants contend that the Act and Regulations are legal and constitutional in all respects.

WHEREFORE, plaintiffs pray that this Court:

1. Issue preliminary and permanent injunctions and its writ of mandate enjoining and preventing defendants and their agents, servants, employees, representa-

tives and successors from enforcing any of the provisions of the Act and Regulations in dispute herein;

2. Issue a declaratory judgment declaring the Act and Regulations in dispute herein unconstitutional, null and void in their entirety as being repugnant to the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution;

3. Grant plaintiffs the costs of suit herein; and

4. Grant such other and further relief as is just.

HENRY RAMSEY, JR.,
CHARLES C. MARSON,
PETER SHEEHAN,
NEIL HORTON,
DEENE SOLOMON,
By CHARLES C. MARSON,
Attorneys for Plaintiffs.

Dated: JULY 14, 1972.

United States District Court
Northern District of California

(No. 72 1045)

FORTNEY H. STARK, JR., ET AL., PLAINTIFFS

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL., DEFENDANTS

(No. 72 1157)

THE CALIFORNIA BANKERS ASSOCIATION, PLAINTIFF

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL., DEFENDANTS

MEMORANDUM OF DECISION

Before: HAMLIN,* *Circuit Judge,* EAST and SWEIGERT, *District Judges.*

SWEIGERT, J.:

Plaintiffs in No. 72–1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72–1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

*Judge Hamlin dissents in part.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051–1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. sub-part C, Secs. 103.31–103.37. Section 1829b (b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31–103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional violation in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 1101 and 1121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21–103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

REPORTING OF FOREIGN FINANCIAL TRANSACTIONS

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub. b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101, excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122.)

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, there is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) at 526. The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has

traditionally recognized a distinction between domestic surveillance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign powers are involved. See, *United States* v. *United States District Court*, — U.S. — (6/19/72) (slip opinion pp. 10–12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

REPORTING OF DOMESTIC FINANCIAL TRANSACTIONS

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by persons participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Trans-

action-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary instruments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made both by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm all checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction,

the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further, such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly

authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment.[1]

That there is such a thing as a constitutionally protected "right of privacy" has been recognized by the Supreme Court in such cases as *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Katz* v. *United States,* 389 U.S. 347 (1967) and most recently in *United States* v. *United States District Court* — U.S. — (June 19. 1972).[18]

In *Katz* v. *United States, supra,* the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See, *Lewis* v. *United States,* 385 U.S. 206, 210 (1966); *United States* v. *Lee,* 274 U.S. 559,

[1] It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

[18] See also, *Doe* v. *McMillan,* 442 F. 2d 879 (D.C. Cir. 1971); *York* v. *Story,* 324 F. 2d 250 (9th Cir. 1963); *Zimmerman* v. *Wilson,* 81 F. 2d 847, 849 (3d Cir. 1936). But see, 25 F. Supp. (1938), aff'd in 105 F. 2d 583, 586 (1939); *Dietmann* v. *Time,* 284 F. Supp. 925 (C.D. Cal. 1966); *City of Carmel* v. *Young,* 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex* v. *Smith,* 146 Atl. 34 (New Jersey 1969).

563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See, *Rios* v. *United States,* 364 U.S. 253 (1960); *Ex parte Jackson,* 96 U.S. 727, 733 (1877) * * * No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely intitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

Harlan, J., concurring at p. 360–361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States* v. *United States District Court,* — U.S. — (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive

branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel* v. *Young, supra,* the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold* v. *Connecticut, supra,* held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrusion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer,

either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris* v. *United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith* v. *United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters* v. *Arend,* 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the customer's account, and (2) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detailed information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such, become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz,* supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel* v. *Young,* supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also

falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" * * * "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold* v. *Connecticut, supra,* 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker, supra,* 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summon the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the Bank or by the customer-taxpayer himself as an intervening third party inter-

est whose financial transactions are involved. *Reisman* v. *Coplin*, 375 U.S. 440 (1964).[2]

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

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[2] It is true that in *Donaldson* v. *United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States* v. *Kordell*, 397 U.S. 1, 7; and *Reisman* v. *Coplin*, 375 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States* v. *Morton Salt*, 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro* v. *United States*, 335 U.S. 1 (1948) at 32–33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann* v. *Securities & Ex-*

change Commission, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara* v. *Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States* v. *United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel* v. *Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury, testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U.S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the

banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly, a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, ***whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.*** Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested." (Emphasis added.)

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends

to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by the Bill of Rights, particularly the Fourth Amendment provisions protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above-consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.

Dated: August 4th, 1972.

WILLIAM G. EAST,
District Judge.

W. T. SWEIGERT,
District Judge.

(*Stark, et al.* v. *Connally, et al.*—No. 72–1045)

(*California Bankers Association* v. *Connally, et al.*—No. 72–1157)

HAMLIN, *Circuit Judge,* dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

O. D. HAMLIN.

United States District Court
Northern District of California

(No. 72–1045)

FORTNEY H. STARK, JR., ET AL., PLAINTIFFS

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL., DEFENDANTS

(No. 72–1157)

THE CALIFORNIA BANKERS ASSOCIATION, PLAINTIFF

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL., DEFENDANTS

ORDER GRANTING IN PART PRELIMINARY INJUNCTION

These actions having regularly come on for hearing pursuant to 28 U.S.C. §§ 2282 and 2284, F.R.Civ.P. 65, and LR 17, 114 and 117, Honorable William T. Sweigert, District Judge, Honorable William G. East, Senior District Judge, and Honorable Oliver D. Hamlin, Senior Circuit Judge, presiding, upon the plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss, and a memorandum of decision setting forth and specifying findings of fact and conclusions of law in accordance with F.R.Civ.P. 52 and 65(d) having been duly rendered and filed herein on September 11, 1972:

NOW, THEREFORE, in accordance with said memorandum of decision, it is hereby

(1) *Ordered* that the temporary restraining order heretofore entered in this action on June 30, 1972, be and it hereby is dissolved; and it is further

(2) *Ordered* that, it having been decided by the Court that certain provisions of Public Law 91–508, 84 Stat. 1114 (enacted October 26, 1970), are repugnant to Amendment IV of the Constitution of the United States—to wit: Sections 221, 222, and 223 of Chapter 2 of Title II (Short title: "Currency and Foreign Transactions Reporting Act") of said Public Law 91–508, 84 Stat. at 1122 (now contained in Sections 1081, 1082, and 1083 of Title 31, United States Code), plaintiff's motion to enjoin the enforcement, operation and execution of said specified provisions of said law is granted pending final adjudication of this action, and that defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, be and they hereby are enjoined from enforcing and from implementing by regulations under Part 103, Subparts B and D of Title 31, Code of Federal Regulations, or otherwise, the provisions contained in Sections 1081, 1082, and 1083 of Title 31, United States Code, until further order of this Court or until the adjudication of this action otherwise becomes final; and it is further

(3) *Ordered* that, it having been decided by the Court that the provisions of said Public Law 91–508, other than those specifically referred to and enjoined in clause (2) above are not repugnant to any provision of the Constitution of the United States, plaintiff's motion to enjoin the enforcement, operation and execution of all other provisions of said law—to wit: those provisions of Titles I and II of said Public Law 91–508, 84 Stat. 1114–1124, now contained in Sections 1730d, 1829b, and 1951 through 1959 of Title 12,

United States Code, and in Sections 1051 through 1062, and 1101 through 1122 of Title 31, United States Code, is denied in all respects; and it is further

(4) *Ordered* that defendants' motion to dismiss the complaint for failure to state claims upon which relief can be granted is denied without prejudice.

Ordered in accordance with 28 U.S.C. § 2284(5) this 18th day of October, 1972, at San Francisco, California.

WILLIAM G. EAST,
Senior District Judge.

WILLIAM T. SWEIGERT,
District Judge.

In the United States District Court for the Northern District of California

(No. C-72-1045-WTS)

FORTNEY H. STARK, JR., SECURITY NATIONAL BANK, CHARLES C. MARSON, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, INC., FRED LIEBERMAN, EDWARD C. HARWOOD, CARL BRUER, EDWARD DURELL, AND DOES FIVE THROUGH TWENTY, INCLUSIVE, PLAINTIFFS

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY, GEORGE P. SHULTZ, SECRETARY-DESIGNATE OF THE TREASURY, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, MYLES J. AMBROSE, COMMISSIONER OF CUSTOMS, JOHNNIE M. WALTERS, COMMISSIONER OF THE INTERNAL REVENUE SERVICE, HERMAN NICKERSON, JR., ADMINISTRATOR OF THE NATIONAL CREDIT UNION, THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL HOME LOAN BANK BOARD, THE FEDERAL DEPOSIT INSURANCE CORPORATION, THE SECURITIES AND EXCHANGE COMMISSION, AND DOES TWENTY-ONE THROUGH FORTY, INCLUSIVE. DEFENDANTS

JAMES L. BROWNING, JR.,
United States Attorney.
JOHN M. YOUNGQUIST,
Assistant United States Attorney,
Chief, Tax Division.
San Francisco, California 94102,
Attorneys for Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM ORDER GRANTING IN PART PRELIMINARY INJUNCTION

NOTICE IS HEREBY GIVEN that all defendants above named hereby appeal to the Supreme Court of the United States from that portion of the Order Granting In Part Preliminary Injunction filed in this action on October 18, 1972, which holds under clause (2) thereof, an Act of Congress (to wit: Public Law 91-508, 84 Stat. 1114) to be unconstitutional in part, said order being an interlocutory order granting an interlocutory injunction restraining the enforcement of said Act in part.

This appeal is taken and this notice is filed pursuant to 28 U.S.C. §§ 1252, 1253, 2101(a), and 2282, and Rules 10 and 11 of the Rules of the Supreme Court of the United States.

Please take Further Notice that a previous notice of appeal in this action was filed by defendants on October 6, 1972, from that portion of the decision of the three-judge Court filed herein on September 11, 1972, which could be construed as an appealable interlocutory order. The order of October 18, 1972, granting in part preliminary junction, may now be construed as the appealable order issuing from said decision and may accordingly moot the notice of appeal filed October 6, 1972. Therefore, the instant notice of appeal is filed by defendants.

JAMES L. BROWNING, JR.,
United States Attorney.

By JOHN M. YOUNGQUIST,
Assistant United States Attorney,
Chief, Tax Division,
Attorneys for Defendants.

Dated: NOVEMBER 13, 1972.

In the United States District Court for the Northern District of California

(No. C–72–1157–WTS)

THE CALIFORNIA BANKERS ASSOCIATION, PLAINTIFF

v.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES; GEORGE P. SHULTZ, SECRETARY-DESIGNATE OF THE TREASURY; WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY; MYLES J. AMBROSE, COMMISSIONER OF CUSTOMS; JOHNNIE M. WALTERS, COMMISSIONER OF THE INTERNAL REVENUE SERVICE; HERMAN NICKERSON, JR., ADMINISTRATOR OF THE NATIONAL CREDIT UNION; THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; THE FEDERAL HOME LOAN BANK BOARD; THE FEDERAL DEPOSIT INSURANCE CORPORATION; AND THE SECURITIES AND EXCHANGE COMMISSION, DEFENDANTS

JAMES L. BROWNING, JR.,
United States Attorney.
JOHN M. YOUNGQUIST,
Assistant United States Attorney,
Chief, Tax Division,
San Francisco, California 94102.
Attorneys for Defendants.

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Please Take Further Notice that a previous notice of appeal in this action was filed by defendants on October 6, 1972, from that portion of the decision of the three-judge Court filed herein on September 11, 1972, which could be construed as an appealable interlocutory order. The order of October 18, 1972, granting in part preliminary injunction, may now be construed as the appealable order issuing from said decision and may accordingly moot the notice of appeal filed October 6, 1972. Therefore, the instant notice of appeal is filed by defendants.

JAMES L. BROWNING, JR.,
United States Attorney

By

JOHN M. YOUNGQUIST,
Assistant United States Attorney,
Chief, Tax Division,
Attorneys for Defendants.

Dated: NOVEMBER 13, 1972.

APPENDIX B

Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114:

TITLE I—FINANCIAL RECORDKEEPING

Chapter	Sec.
1. Insured Banks and Insured Institutions	101
2. Other Financial Institutions	121

Chapter 1.—INSURED BANKS AND INSURED INSTITUTIONS

Sec.
101. Retention of records by insured banks.
102. Retention of records by insured institutions.

§ 101. Retention of records by insured banks

The Federal Deposit Insurance Act is amended (1) by redesignating sections 21 and 22 as 22 and 23, respectively, and (2) by inserting the following new section immediately after section 20:

"SEC. 21. (a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

"(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

"(b) Where the Secretary of the Treasury (re-

ferred to in this section as the 'Secretary') determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

"(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

"(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

"(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

"(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c).

"(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transac-

tions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

"(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

"(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

"(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law."

§ 102. Retention of records by insured institutions

Title IV of the National Housing Act is amended by adding at the end thereof the following new section:

"SEC. 411. The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in section 21 of the Federal Deposit Insurance Act with respect to insured banks."

Chapter 2.—OTHER FINANCIAL INSTITUTIONS

Sec.

121. Congressional findings and purpose.
122. Authority of Secretary with respect to reports on ownership and control.
123. Authority of Secretary with respect to recordkeeping and procedures.
124. Injunctions.
125. Civil penalties.
126. Criminal penalty.
127. Additional criminal penalty in certain cases.
128. Compliance.
129. Administrative procedure.

§ 121. Congressional findings and purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 122. Authority of Secretary with respect to reports on ownership and control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes

therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

§ 123. Authority of Secretary with respect to record-keeping and procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b), any records or evidence of any type which the Secretary is authorized under section 21 of the Federal Deposit Insurance Act to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

§ 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

§ 125. Civil penalties

(a) For each willfull violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof

who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 126. Criminal penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 127. Additional criminal penalty in certain cases

Whoever willfully violates any regulation under this chapter, section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

§ 129. Administrative procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 5, United States Code shall apply to all proceedings under this chapter, section 21 of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS

Chapter	Sec.
1. General Provisions	201
2. Domestic Currency Transactions	221
3. Reports of Exports and Imports of Monetary Instruments	231
4. Foreign Transactions	241

Chapter 1.—GENERAL PROVISIONS

Sec.
201. Short title.
202. Purpose.
203. Definitions and rules of construction.
204. Regulations.
205. Compliance.
206. Exemptions.
207. Civil penalty.
208. Injunctions.
209. Criminal penalty.
210. Additional criminal penalty in certain cases.
211. Immunity of witnesses.
212. Availability of information to other Federal agencies.
213. Administrative procedure.

§ 201. Short title

This title may be cited as the "Currency and Foreign Transactions Reporting Act".

§ 202. Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this title generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to

institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this title or the provision thereof in question.

(j) All reports required under this title and all records of any such reports are specifically exempted from disclosure under section 552 of title 5, United States Code.

(k) For the purposes of section 1001 of title 18, United States Code, the contents of reports required under any provision of this title are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

§ 204. Regulations

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

§ 205. Compliance

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

§ 206. Exemptions

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

§ 207. Civil penalty

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

§ 209. Criminal penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

§ 210. Additional criminal penalty in certain cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

§ 211. Immunity of witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide

other information in a proceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 212. Availability of information to other Federal agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this title to any other department or agency of the Federal Government on the request of the head of such department or agency.

§ 213. Administrative procedure

Subject to section 203(j), the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 4. United States Code, shall apply to all proceedings under this title.

Chapter 2.—DOMESTIC CURRENCY TRANSACTIONS

Sec.
221. Reports of currency transactions required.
222. Persons required to file reports.
223. Reporting procedure.

§ 221. Reports of currency transactions required

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons required to file reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution

which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except htat (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Chapter 3.—REPORTS OF EXPORTS AND IMPORTS OF MONETARY INSTRUMENTS

Sec.
231. Reports required.
232. Forfeiture.
233. Civil liability.
234. Remission by the Secretary.
235. Enforcement authority.

§ 231. Reports required

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any

common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

§ 232. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 231(1) either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

§ 233. Civil liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liabilty under this section shall be reduced by any amount actually forfeited under section 232.

§ 234. Remission by the Secretary

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

§ 235. Enforcement authority

(a) If the Secretary has reason to believe that moneary instruments are in the process of transportation and with respect to which a report required under section 231 has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Sec.
241. Records and reports required.
242. Classifications and requirements.

Chapter 4.—FOREIGN TRANSACTIONS

§ 241. Records and reports required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary

instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

§ 242. Classifications and requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of

the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

* * * * *

Trading with the Enemy Act, c. 106, 40 Stat. 411:

SEC. 5. * * *

* * * * *

(b) [as amended by Sec. 2, Act of March 9, 1933, c. 1, 48 Stat. 1, and Sec. 301, First War Powers Act, 1941, c. 593, 55 Stat. 838] (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transaction in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving any property in

which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof * * *: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation. [12 U.S.C. (1940 ed., Supp. V) 95a.]

Treasury Regulations on Financial Recordkeeping and Reporting of Currency and Foreign Transactions (31 C.F.R.):

SUBPART A—DEFINITIONS

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank;

(3) A savings and loan association or a building and loan association organized under the laws of any State or of the United States;

(4) An insured institution as defined in section 401 of the National Housing Act;

(5) A savings bank, industrial bank or other thrift institution;

(6) A credit union organized under the laws of any State or of the United States; and

(7) Any other organization chartered under the banking laws of any State and subject to the supervision of the bank supervisory authorities of a State.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision where it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A bank;

(2) A broker or dealer in securities;

(3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) A person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) An operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States.

(6) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include

an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which:

(1) Is issued in bearer or registered form;

(2) Is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) Is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) Evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds

by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required To Be Made

§ 103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of currency transactions.

(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.[1]

(b) Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported

[1] Forms filed as part of the original document.

because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Reports of transportation of currency or monetary instruments.

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof.[1] A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under paragraph (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a Federal Reserve Bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency

[1] Forms filed as part of the original document.

or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by paragraph (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 Reports of foreign financial accounts.

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other finan-

cial account in a foreign country shall report such relationship as required on his Federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 Filing of reports.

(a) Reports required to be filed by the first paragraph of § 103.22 shall be filed on or before the 45th day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by § 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by § 103.23(b) shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments. They may be filed with the Customs

officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by §§ 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by § 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 Identification required.

Before effecting any transaction with respect to which a report is required under the first paragraph of § 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

SUBPART C—RECORDS REQUIRED TO BE MAINTAINED

§ 103.31 Determination by the Secretary.

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be made and retained by persons having financial interests in foreign financial accounts.

Records of accounts required by § 103.24 to be reported on a Federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of 5 years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be made and retained by financial institutions.

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) A record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) A record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) A record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 Additional records to be made and retained by banks.

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that acount.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn

on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (3) of this paragraph;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter,

cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subparagraph shall be applicable only with respect to demand deposits.

§ 103.35 Additional records to be made and retained by brokers and dealers in securities.

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in § 240.17a–3(a) (1), (2), (3), (5), (6), (7), (8), and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

§ 103.36 Nature of records and retention period.

(a) Wherever it is required that there be retained either the original of a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by § 103.34(b)(10) to be retained by banks shall be retained for a period

of 2 years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of 5 years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person outside the United States.

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately 50 miles of the location of the institution, or who is known to be temporarily outside the United States.

SUBPART D—GENERAL PROVISIONS

§ 103.41 Dollars as including foreign currency.

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or other reproductions of Government obligations.

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(a) Currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(b) Any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of information.

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

§ 103.44 Disclosure.

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of title 5, United States Code.

§103.45 Exceptions, exemptions, modifications, and reports.

(a) The Secretary, in his sole discretion may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 Enforcement.

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) To the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) To the Board of Governors of the Federal Reserve System, with respect to State bank members of the Federal Reserve System;

(3) To the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) To the Administrator of the National Credit Union Administration, with respect to Federal credit unions;

(5) To the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by State or Federal bank supervisory authorities;

(6) To the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) To the Commissioner of Customs with respect to §§ 103.23 and 103.48;

(8) To the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Overall responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 Civil penalty.

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under § 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under § 103.48.

§ 103.48 Forfeiture of currency or monetary instruments.

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under § 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in § 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 Criminal penalty.

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than 1 year, or both. Such person may in addition, if the violation is of any provision authorized by title I of Public Law 91–508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than 1 year, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

(b) Any person who willfully violates any provision of title II of Public Law 91–508, or of this part authorized thereby, where the violation is either

(1) Committed in furtherance of the commission of any other violation of Federal law, or

(2) Committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than 5 years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 Enforcement authority with respect to transportation of currency or monetary instruments.

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under § 103.23 has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

Effective date. This part shall become effective July 1, 1972.

APPENDIX C

TITLE 31—MONEY AND FINANCE: TREASURY

CHAPTER I—MONETARY OFFICES, DEPARTMENT OF THE TREASURY

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

Financial Reporting and Recordkeeping

On October 28, 1972, a notice of proposed rule making containing proposed amendments to various provisions of this Part was published in the Federal Register (37 F.R. 23114 (1972)). In accordance with the notice, interested persons were afforded an opportunity to submit written comments. After consideration of all such relevant matters as were presented by interested parties regarding the rules proposed, the following amendments are hereby adopted effective January 17, 1973.

SAMUEL R. PIERCE, JR.,
General Counsel.
EUGENE T. ROSSIDES,
Assistant Secretary.

[PREAMBLE]

The key provisions of the proposal were essentially as follows:

1. Eliminate the requirement that banks keep microfilm copies of checks drawn for $100 or less.

2. Require that information made available to other departments or agencies under this part shall be received in confidence and not disclosed except for official purposes.

3. State specifically that these regulations do not authorize the Secretary or any other person to inspect or review financial records maintained under this part.

4. Eliminate operators of credit card systems from the definition of a financial institution subject to this part.

5. Delete a phrase which allows the Secretary by written order or authorization to impose additional recordkeeping or reporting requirements.

After careful consideration of the comments received, it has been decided to exempt checks of $100 or less from the copying requirement.

With regard to disclosure of information, the proposed change is intended to ensure that information resulting from the recordkeeping and reporting requirements will be made available to other departments or agencies of the United States solely for the purposes intended. Various comments suggested that the proposed language did not go far enough, and that the change should forbid disclosure to any other department or agency. Such a restriction would mean that cases involving information obtained from this Department could not be referred to the Department of Justice for prosecution until the Secretary gave his approval. This would simply cause further delay without serving any worthwhile purpose. Every federal department or agency has sanctions against the unauthorized disclosure of official information, and those sanctions have proved effective. Accordingly, the proposed language has been adopted unchanged.

Certain of the comments on the proposed regulation dealing with access to records maintained under this part suggested that the proposal is inadequate to protect the rights of bank customers, however, the

proposal is intended merely to point out that these regulations do not authorize access to customer records, but that access to such records is governed by other applicable law. The supervisory agencies which have been given responsibility for assuring compliance with the regulations may, of course, have access to these records as necessary to assure that they are being kept as required.

The proposal to eliminate operators of credit card systems from the definition of a financial institution for purposes of this part met with general approval, except that some doubt arose as to its effect upon the operation of bank credit card systems. Since it was agreed that all credit card operators, including banks, should be removed from the scope of the regulations, the definition of a financial institution has been amended to exclude bank credit card systems, as well as operators of credit card systems, from the definition.

Comments on the proposed deletion of the phrase which allows the Secretary by written order or authorization to impose additional recordkeeping or reporting requirements were favorable to the proposal; however, one comment suggested that the phrase "or otherwise modify" the requirements of this part also should be deleted. This suggestion is consistent with the intent of the proposed amendment, and it has been adopted.

Part 103 of Title 31 of the Code of Federal Regulations is amended as follows:

1. Subpart A is amended by deleting from § 103.11 subparagraph (5) of the definition of a financial institution, renumbering the following subparagraphs so that the definition of financial institutions will read as follows:

§ 103.11 Meaning of terms.

* * * * *

Financial institution. Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A bank (except bank credit card systems);

(2) A broker or dealer in securities;

(3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) A person who engages as a business in the issuing, selling, or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

* * * * *

2. Subpart C is amended by amending § 103.34 to read as follows:

§ 103.34 Additional records to be made and retained by banks.

(a)(1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall, within forty-five days from the date such an account is opened, secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. In the event that a bank has been unable to secure the identification

required herein with respect to an account within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if (i) it has made a reasonable effort to secure such identification, and (ii) it maintains a list containing the names, addresses, and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses, and account numbers of those persons available to the Secretary as directed by him.

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS–4 or SS–5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and instrumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (*a*) ambassadors, ministers, career diplomatic or consular officers, or (*b*) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions and immunities as an international organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted

by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10, and (viii) Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a) (3) (vii) and (viii) of this section, the bank shall, within fifteen days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpayer identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under Section 6109 of the Internal Revenue Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn for $100 or less or those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks,

(ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on government agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item in excess of $100 (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under paragraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a bank, broker or dealer in foreign exchange outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not

through a domestic financial institution, from a bank, broker or dealer in foreign exchange outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check in excess of $100 deposited in such account through its domestic processing system or to supply a description of a deposited check in excess of $100. This subparagraph shall be applicable only with respect to demand deposits.

§ 103.35 [Amended]

3. Subpart C is further amended by amending § 103.35 by deleting "paragraph (1)" in paragraph (a) (2), and substituting therefore the words "paragraph (a) (1) of this section"; and by deleting "subsection (1)" in paragraph (a) (3), and substituting therefor the words "paragraph (a) (1) of this section."

4. Subpart D is amended by amending § 103.43 to read as follows:

§ 103.43 Availability of information.

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.

5. Subpart D is further amended by amending § 103.45 to read as follows:

§ 103.45 Exceptions, exemptions, and reports.

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to or grant exemptions from the requirements of this part. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order of authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

6. Subpart D is further amended by adding a new § 103.51 as follows:

§ 103.51 Access to records.

Except as provided in §§ 103.34(a)(1) and 103.35 (a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law.

APPENDIX D

Form 4789 (Rev. 1977)
Department of the Treasury
Internal Revenue Service

Currency Transaction Report

File a separate report for each transaction
(Complete all applicable parts—see instructions)

Part I Identity of person who conducted this transaction with the financial institution

Name (Last, first and middle initial) | Social security number

Number and street | Business, occupation or profession

City or town, State and ZIP code

Part II Person or organization for whom this transaction was completed (Complete only if different than Part I)

Name | Identifying number

Number and street | Business, occupation or profession

City or town, State and ZIP code

Part III Description of transaction (If additional space is needed, attach a separate schedule)

1. Nature of transaction (check the applicable boxes)
   - ☐ Deposit
   - ☐ Withdrawal
   - ☐ Currency exchange
   - ☐ Check cashed
   - ☐ Check purchased
   - ☐ Traveler's checks purchased
   - ☐ Security purchase (specify) _____
   - ☐ Other (specify) _____

2. Total amount of currency transaction (in U.S. dollars) | 3. Amount in denominations of $100 or higher | 4. Date of transaction (Month, day and year)

5. If other than U.S. currency is involved, please furnish the following information:
   Currency name | Country | Total amount of foreign currency

6. If a check was involved in this transaction, please furnish the following information (See instructions):
   Date and amount of check | Payee
   Drawer of check | Drawee bank and City of location

Part IV Type of identification presented in this transaction

By customers:
- ☐ Savings account number _____
- ☐ Checking account number _____
- ☐ Share account number _____
- ☐ Loan account number _____
- ☐ Safety deposit box number _____
- ☐ Other (specify)

By others:
- ☐ Driver's permit — State — Number
- ☐ Passport — Country — Number
- ☐ Alien ID card — Country — Number
- ☐ Other (specify)

Part V Financial institution reporting the financial transaction

Name and address | Identifying number (see instructions)

Business activity

Sign here ▶ _____ Authorized signature | _____ Title | _____ Date

GENERAL INSTRUCTIONS

This report is required by Treasury Department regulations (31 Code of Federal Regulation 103).

Who Must File.—Beginning July 1, 1972, each financial institution (as described in these instructions) shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Exceptions.—Financial institutions are not required to file Form 4789 for transactions:

(1) with Federal Reserve Banks or Federal Home Loan Banks;

(2) solely with, or originated by, financial institutions or foreign banks; or

(3) between a bank and established customers maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the customer's business, industry or profession.

However, upon request each bank shall submit a report listing those customers who engage in transactions which were not reported because of the exemption in (3).

When and Where to File.—This report shall be filed on or before the 45th day following the date of the transaction with the Internal Revenue Service Center, 11601 Roosevelt Boulevard, Philadelphia, Pennsylvania 19155. Forms may be obtained from any Internal Revenue Service office.

Identifying Number.—Social security number or employer identification number if other than individual.

Identification Required.—Before any transaction is effected a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Penalties.—Civil and criminal penalties are provided for failure to file a report or to supply information, and for filing a false or fraudulent report. See sections 103.47 and 103.49 of the regulations.

SPECIFIC INSTRUCTIONS

Part I.—

(1) In the address block, enter the permanent address of the person conducting the transaction.

(2) In the social security block, enter the social security number of the person conducting the transaction. If the person has no number, write "None" in this block.

Part II.—

(1) In the name block, individuals should enter their last name, first name and middle initial, if any, in that order. All others should enter their complete organization name.

(2) In the identifying number block, enter the social security number or employer identification number.

Part III, line 6.—This part should be completed only where a check is cashed or a bank check is purchased with currency.

Part IV.—See instruction "Identification Required," above.

Part V.—Institutions may also enter in the name and address block other identifying information.

DEFINITIONS

Bank.—Each agent, agency, branch or office within the United States of a foreign bank and each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

Currency.—The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the

country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Financial Institution.—Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively, or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Person.—An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Transaction in Currency.—A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

APPENDIX E

TREASURY DEPARTMENT,
Washington, D.C.

(Release A. M. Newspapers, Monday, August 3, 1959)

The following letter signed by Secretary Anderson is being sent to banks and other financial institutions:

AUGUST 3, 1959.

To Banks and Other Financial Institutions:

Since 1945 the Treasury Department regulations have required every financial institution in the United States to file on Form TCR–1, Report of Currency Transactions, monthly reports of large and unusual currency transactions. This form has now been revised and simplified to permit easier preparation by financial institutions and increased usefulness to the Treasury Department's Internal Revenue Service. In addition, only one copy of the new smaller form is to be submitted instead of two copies as required heretofore. The supply of old forms should continue to be used until exhausted, but only one copy of each report should be filed.

In view of the fact that recently there has been a wide variance among financial institutions with respect to reporting large or unusual currency transactions, I would like to again emphasize how important full and careful reporting by banks is to the Internal Revenue Service. These reports were originally developed for the purpose of discovering large currency transactions resorted to by racketeers, dealers in narcotics, foreign agents, and others engaged in illegal activities as an attempted method of concealing income. Particularly, the reports have been of invaluable

assistance to the Internal Revenue Service in breaking some of the largest income tax evasion cases. For example, in fiscal years 1957 and 1956, the Revenue Service completed 129 fraud cases involving additional tax and penalties of approximately $13,500,000 which originated from information contained in Forms TCR–1 submitted by banks and other financial institutions.

The Internal Revenue Service has recently revised its procedure to provide for better utilization of the currency reports and tighter controls for their handling by its employees. Instructions were issued again cautioning Internal Revenue employees that the reporting of currency transactions by financial institutions should not be divulged to the customers of the reporting institutions.

At this time I would like also to call to your attention the importance of financial institutions requiring satisfactory identification. Instances have recently been brought to our attention in which individuals have engaged in large and unusual currency transactions and have furnished false or inadequate identification. Transactions of this nature can have far-reaching effects on the protection of the Federal revenue, and all banks and other financial institutions are requested to guard against those transactions where satisfactory identification is not furnished by persons or organizations (including any agents or couriers) engaged in currency transactions. Attention is invited to the Instructions Relating to Reports of Currency Transactions, which provide in part:

> Section 102.3 Identification required. No financial institutions shall effect any transaction with respect to which a report is required unless the person or organization with whom such transaction is to be effected has been satisfactorily identified.

A recent survey of the forms filed indicates that some financial institutions are not submitting reports when it appears obvious that the criteria for the submission of reports have been met; while, on the other hand, there are indications that some few reports are received of cash transactions which are ordinary, necessary, and commensurate with the customary financial requirements of the persons or organizations making the transactions. Therefore, I would like to urge all financial institutions to re-examine their methods of handling this program. There are attached a copy of the current instructions and the new Form TCR–1. It may be that because of the constant pressures of day-to-day problems, and in some instances the mergers of banks, some officials of financial institutions are unfamiliar with the Treasury Department's currency reporting program. Officials of all banks and other financial institutions are requested to give their wholehearted cooperation in furnishing information to enable the Internal Revenue Service to identify the few tax cheats, thereby helping to protect the economic and financial interests of the vast majority of our citizens.

I am sure that upon reviewing this matter all financial institutions will realize the importance of proper reporting and assisting the Treasury Department in this area as they have in so many other ways. The Treasury Department is grateful for the assistance rendered it by the financial institutions of the country.

Sincerely,

ROBERT B. ANDERSON,
Secretary of the Treasury.

TR-1
Treasury Department
(Revised 8-3-60)

REPORT OF CURRENCY TRANSACTIONS

See Reverse for Instructions

A. PERSON OR ORGANIZATION CONCERNED IN TRANSACTIONS REPORTED

Name

Address

Business, profession, or occupation

B. DESCRIPTION OF TRANSACTIONS

U.S. Currency Involved		Nature of Transactions (State whether deposit, withdrawal, exchange of currency, cashing or purchase of check, etc.)
Total Amount	Amount in denominations of $100 or higher	

Additional information

C. FINANCIAL INSTITUTION REPORTING

Name

Address
(Number) (Street) (City) (State)

INSTRUCTIONS

This report is required pursuant to Treasury Department regulations revised May 3, 1960 (31 Code of Federal Regulations 103).

Forms TCR-1 shall be prepared in original only for currency transactions involving United States currency as follows:

1. Transactions involving $2,000 or more of United States currency in denominations of $100 or higher;
2. Transactions involving $10,000 or more of United States currency in any denominations, and
3. Transactions involving any amount in any denominations,

which in the judgment of the financial institution exceed those commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.

Reports shall be filed on or before the 15th day of the month following that within which the reported transactions occur, with the Federal Reserve Bank of the district in which the reporting financial institution is located. Copies of this report may be obtained from any Federal Reserve Bank.

U.S. GOVERNMENT PRINTING OFFICE: 1970

FILED

In the Supreme Court of the United States

October Term, 1972

THE CALIFORNIA BANKERS ASSOCIATION, APPELLANT

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

FORTNEY H. STARK, JR., ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY TO APPEAL

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-985

THE CALIFORNIA BANKERS ASSOCIATION, APPELLANT

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

No. 72-1196

FORTNEY H. STARK, JR., ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, the appellees, the Secretary of the Treasury and other named officials of the United States, move that the portion of the order of the district court from which the appeal is taken be affirmed.

STATEMENT

This is a direct appeal from a preliminary injunction denying appellants' motion against enforcement of the financial recordkeeping and foreign transactions reporting provisions of the Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114 (popularly known as the Bank Secrecy Act), and the implementing Treasury Regulations.[1] Appellant in No. 72-985 (hereafter CBA J.S.), The California Bankers Association, is an association of all state and national banks doing business in the State of California (CBA J.S. App. 42). Appellants in No. 72-1196 (hereafter ACLU J.S.) consist of one national bank, its president, a bank customer, and several individuals who intend to engage in foreign financial transactions reportable under the Bank Secrecy Act and who maintain interests in or signature authority over foreign bank accounts (ACLU J.S. 8, n. 8).

On June 7 and 22, 1972, a few days before the regulations implementing the Act were scheduled to go into effect, appellants brought these actions alleging violations of various constitutional provisions and requesting declaratory and injunctive relief. A three-judge court was convened pursuant to 28 U.S.C. 2282 to hear and decide the constitutional issues raised by the complaints. The district court held, one judge dissenting, that the domestic currency transaction reporting requirements of Chapter 2 of Title II and the Regulations thereunder are invalid under the

[1] Treasury Regulations on Financial Recordkeeping and Reporting of Currency and Foreign Transactions (31 C.F.R., Part 103).

Fourth Amendment as an overly broad intrusion into financial privacy (CBA J.S. App. 46–58) and issued a preliminary injunction forbidding the defendants from enforcing such provisions nationwide (CBA J.S. App. 61–63). The district court unanimously sustained the constitutionality of Title I and all other portions of Title II and the Regulations (CBA J.S. App. 44–46) and denied the injunctive relief sought with respect to such provisions (CBA J.S. App. 62–63). The present appeals challenge this order insofar as it denied the requested relief.[2]

ARGUMENT

The opinion and order of the district court denying a preliminary injunction to restrain the operation and enforcement of the provisions of the Bank Secrecy Act here challenged are correct, and this case presents no substantial issue warranting plenary consideration by this Court.

I. TITLE I OF THE BANK SECRECY ACT IS NOT UNCONSTITUTIONAL

Title I of the Bank Secrecy Act authorizes the Secretary of the Treasury to require banks and other

[2] The Secretary of the Treasury and the other named defendants have filed a direct appeal from the same order of the three-judge district court insofar as it granted a preliminary injunction against enforcement of certain provisions of Title II of the Bank Secrecy Act and the Treasury Regulations implementing such provisions. *George P. Shultz, Secretary of the Treasury, and All other Defendants in the District Court, Appellants* v. *The California Bankers Association, Fortney H. Stark, Jr., et al.*, No. 72–1073.

financial institutions to maintain records of the identity of their customers, together with microfilm copies of various financial instruments, such as checks drawn and presented for payment. The declared purpose of Title I of the Act is to "require the maintenance of appropriate types of records * * * where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Sec. 101 (12 U.S.C. 1829b(a)(2)) and Sec. 121(b) (12 U.S.C. 1951(b)). Section 101 requires banks subject to the Federal Deposit Insurance Act to maintain certain records and authorizes the Secretary of the Treasury to prescribe record retention periods of up to six years. Sections 122 and 123 (12 U.S.C. 1952, 1953) authorize the Secretary to issue Regulations requiring the maintenance of similar records in the case of other domestic financial institutions, and to require reports as to their ownership, management, and control. In the case of insured banks, the administrative and enforcement provisions of the Federal Deposit Insurance Act are applicable. Title I itself contains other provisions applicable to non-insured institutions, for the administration and enforcement of the records maintenance and retention statutes, including provisions for injunctions (Sec. 124 (12 U.S.C. 1954)), and civil and criminal penalties (Secs. 125–127 (12 U.S.C. 1955–1957)).

The Treasury Regulations implementing the Title I recordkeeping statutes require all financial institutions to maintain records of extensions of credit [3] in

[3] An exception is made if the extension of credit is secured by an interest in real property.

excess of $5,000, and transfers of currency, other monetary instruments, checks, investments securities or credit of more than $10,000 to persons, accounts or places outside the United States. 31 C.F.R. 103.33. The Regulations also require insured banks to maintain records or copies thereof of a somewhat larger number and type. It is required that the banks secure and maintain a record of the taxpayer identification or social security number of customers having deposit or share accounts. The principal type of record of which microfilm or other copies must be maintained is checks, drafts and money orders drawn on the bank or issued and payable by it.[4] Excluded from this requirement are dividend, pay-

[4] Other records of which insured banks are required to maintain microfilm or other copies are (1) documents granting signature authority over accounts; (2) statements or ledger cards showing all transactions in or with respect to each account; (3) items (other than bank charges) comprising debits to accounts; (4) items of more than $10,000 transmitted or remitted to persons, accounts or places outside of the United States; (5) records of remittances and transfers of funds, currency, other monetary instruments, checks, investment securities or credit of more than $10,000 to persons, accounts or places outside the United States; (6) checks and drafts of foreign banks in excess of $10,000 purchased, received for credit or collection or otherwise acquired; (7) items of more than $10,000 received from a person, account or place outside the United States; (8) records of receipts of currency, other monetary instruments, checks and investment securities and transfers of funds or credit in excess of $10,000 from persons, accounts or places outside the United States, and (9) records necessary to reconstruct a demand deposit account and to describe deposited checks or trace such items through its domestic processing system. 31 C.F.R. 103.34. Records of the last category are to be retained two years, and all others for a period of five years. 31 C.F.R. 103.36(c).

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roll, employee benefit, insurance claim, medical benefit, pension and annuity checks if the account averages at least 100 checks per month; checks drawn on accounts of government agencies, securities brokers and dealers, fiduciaries, and financial institutions (31 C.F.R. 103.34(b)(3); and all checks of $100 or less (§ 103.34(b)(3), (10) of the amended Regulations [5]) (G. J.S. App.[6] 116, 118).

The jurisdictional statements essentially raise three separate challenges to these recordkeeping provisions of Title I.

1. THE CALIFORNIA BANKERS ASSOCIATION (NO. 72-985)

The California Bankers Association (CBA) is "an unincorporated association consisting of 158 state and national banks doing business in the State of California" (G. J.S. App. 26). CBA alleges that the recordkeeping requirements of Title I of the Act "violate the Fourth Amendment guarantee against unreasonable search and seizure" and that these requirements "confiscate a bank asset—the assurance of customer privacy—without due process of law" (CBA J.S. 2–3). This claim is joined in by the Security National Bank, and its president Fortney H. Stark, Jr. (G. J.S. App. 37–38), who are among the appellants who have joined the ACLU Jurisdictional Statement (No. 72–1196).

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[5] The amended Regulations were promulgated on January 22, 1973, after the decision below was handed down (38 Fed. Reg. 2174).

[6] "G. J.S." refers to the jurisdictional statement filed by the Secretary of the Treasury and the other named defendants (No. 72–1073).

These claims are premature and without merit. Title I and the regulations promulgated by the Secretary do not compel disclosure of any records kept by the banks; they only require banks to make and retain certain records. Sec. 103.51 of the amended Regulations (G. J.S. App. 119); H. Rep. No. 91-975, 91st Cong. 2d Sess., p. 10). The Fourth Amendment, "if applicable" at all to corporations, protects only against "unreasonable" demands for *"disclosure"* of records (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652–653). Since no compelled disclosure—indeed, no disclosure of any kind—is involved here, there is no basis for the assertion by the banks of any Fourth Amendment claim. See *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 145. "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89.

Contrary to appellants' suggestion, there is no basis for the claim that the recordkeeping requirements of Title I are unreasonable:

> [C]orporations can claim no equality with individuals in the enjoyment of a right of privacy. * * * They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. [*United States* v. *Morton Salt Co., supra*, 338 U.S. at 652.]

While "[i]t may be assumed * * * that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency * * * those bounds have [not] been overstepped * * * when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." *Shapiro* v. *United States*, 335 U.S. 1, 32.

The "basic activity" regulated here—commercial banking transactions—is one which is affected with a public interest and subject to substantial regulation under numerous constitutional powers, including the Commerce Clause. Congress plainly has the authority to provide for the retention of records of those transactions to insure that the channels of interstate commerce are employed in a manner which will facilitate rather than jeopardize or hinder the enforcement of tax and criminal laws, and as part of its power to do all things necessary and proper to provide for the enforcement of federal criminal, tax and regulatory laws.[7]

[7] The actual burden on the banks despite exaggerated and unsubstantiated claims is hardly "staggering" (ACLU J.S. 15). Appellants do not challenge the congressional finding that most of the records affected by the statute have been maintained by financial institutions in any event (H. Rep. No. 91-975, *supra*, pp. 10-11; S. Rep. No. 91-1139, 91st Cong., 2d Sess., p. 5) and nothing in the record here supports a contrary finding. The only concrete evidence submitted by the appellants relates to costs incurred by the Bank of America, whose cost of compliance with Title I in 1971 was said to be $392,000 (ACLU J.S.

Appellants' claim that Congress is without power to compel the keeping of records which may be used for purposes other than the regulation of the recordkeeper's own business (ACLU J.S. 16) is unsupported by any authority. Numerous provisions of the Internal Revenue Code and the Treasury Regulations thereunder require financial institutions and other third parties to maintain records of the financial transactions of their customers, employees, and others with whom they deal.[8] *Marchetti* v. *United States*, 390 U.S. 39, 57, upon which appellants rely (ACLU J.S. 16, n. 12) is inapposite. That case dealt with the circumstances under which Congress could compel the production of information which would incriminate the recordkeeper. See *Minor* v. *United States*, 396 U.S. 87, 92. The limitations prescribed in *Marchetti* have no application where, as here, the recordkeeper, a corporate entity, could not under any circumstances invoke the privilege against self-incrimination.[9]

2. THE BANK CUSTOMERS (ACLU J.S. NO. 72–1196)

Appellant Charles Marson claims to be a customer of the Bank of America, and appellant Fortney Stark, Jr., in addition to being President of the Security

11). The Bank of America, however, is one of the largest banks in the United States with 997 branches and a *net* income of $178,400,000. Moody's *Bank and Finance Manual* (1972), pp. 633–634. Accepting these figures as illustrative of the general impact on other banks, the tax deductable expense of compliance is not unreasonable.

[8] A summary of many of these statutes and regulations is set out in Appendix A, *infra*, pp. 25–26.

[9] Since banking is an enterprise subject to the broad regulatory powers of Congress, there is likewise no basis for the claim

National Bank, also alleges that he is a bank customer. Both alleged in the complaint (to the extent here pertinent) that the recordkeeping requirements of Title I violate their "right to be free from unreasonable searches and seizures under the Fourth Amendment" (G. J.S. App. 33–34, 40).

The appellants apparently recognize that these claims (like those asserted by the CBA and the Security National Bank) are premature since the challenged provisions of Title I do not compel disclosure but merely require the banks to keep records of information obtained from depositors.[10] Appellants argue, however, that "at least with respect to records * * * [which banks] would not otherwise make or keep," the banks must be regarded as "agents" of the government when they compile records pursuant to the direction of the Act or when they retain such records "past the time dictated by sound business practice." Accordingly, appellants argue, without citation of authority, an illegal "seizure" takes place every time the bank makes or retains a record under the compulsion of the Act (ACLU J.S. 17–19, 22).

Even if it were assumed *arguendo* that in these circumstances the banks are accurately characterized as "agents" of the government, a "seizure" does not

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of the individual appellants, that if the Bank Secrecy Act is sustained, "all citizens" could be included in "the government's surveillance corps" and compelled to "keep watch" on other citizens (ACLU J.S. 16).

[10] The bank records required by Title I are, however, no more available to government officials than bank records generally under ordinary internal revenue summons practice.

occur, within the meaning of the Fourth Amendment, when an agent of the government makes a record of information voluntarily disclosed to him. On the contrary, this Court has held that "the Fourth Amendment cannot be translated into a general constitutional 'right of privacy'" (*Katz* v. *United States*, 389 U.S. 347, 350) and that the recording of information voluntarily disclosed to others, even when a citizen is not aware that the disclosure is being made to a government agent, does not violate the Fourth Amendment. *United States* v. *White*, 401 U.S. 745, 749; *Hoffa* v. *United States*, 385 U.S. 293; *Lewis* v. *United States*, 385 U.S. 206.

Moreover, even in a case actually involving an otherwise valid subpoena or internal revenue summons to compel a bank to disclose records kept pursuant to Title I, there would be no basis for a claim by the bank's customers under the Fourth or Fifth Amendments since the compulsory process would be directed to the bank rather than the customers and the records sought would belong to and be in the possession of the bank. *Couch* v. *United States*, No. 71–889, decided January 9, 1973. Appellants' argument that a subpoena directed toward such records violates their constitutional rights can be sustained only if the Constitution can be deemed to create a "bank-customer" privilege, which would bar disclosure by the bank of information disclosed by a customer to the bank, without regard to whether the information was kept pursuant to statutory direction or for the convenience of the bank. But the Constitution does not require any such

privilege. As the Court held in *Branzburg* v. *Hayes*, 408 U.S. 665, 682:

> Citizens generally are not constitutionally immune from grand jury subpœnas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.[11]

Appellee's reliance upon *Griswold* v. *Connecticut*, 381 U.S. 479, and *Roe* v. *Wade*, No. 70–18, decided January 22, 1973, for the proposition that a customer's communications with his bank are protected by "a constitutional right of privacy [which] exists independent of the Fourth Amendment" (ACLU J.S. 21), is misplaced. Stated most comprehensively, the proposition for which these cases stand is that without a compelling interest a state may not interfere with an individual's "freedom of choice in the basic decisions

[11] Of the three cases cited by appellants in regard to the privacy of financial affairs, one—*Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284—involved a bank's disclosure of its customer's finances to a private third party, and the court recognized (83 Idaho at 587–588, 367 P. 2d at 290) that the State would be entitled to disclosure if the information were sought pursuant to valid legal process. The other two cases—*Brex* v. *Smith*, 104 N.J. Eq. 386, 146 Atl. 34, and *City of Carmel-by-the-Sea* v. *Young*, 2 Cal. 3d 259, 466 P. 2d 225—involve traditional Fourth Amendment questions: in the former, whether a public prosecutor had the legal authority to demand that the bank records of public employees and their families be submitted for inspection, and in the latter whether a requirement of public disclosure by all public officials of financial interests in excess of $10,000 was an unreasonably broad intrusion into private affairs in light of the state interest asserted. Even in the *City of Carmel* case, which has the broadest language in this regard, the court specifically indicated (2 Cal. 3d at 272, 466 P. 2d at 234) that such affairs would not be immune from disclosure under a properly drawn statute.

of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children" (*Roe* v. *Wade, supra,* slip op. 3, Douglas, J. concurring). These cases and similar holdings are wholly inapposite here.

Finally, there is no basis for appellants' claim that if the constitutionality of Title I is sustained, Congress could, "[a]s soon as the technology is developed," compel telephone companies to tape record and save telephone conversations for subsequent use pursuant to legal process (ACLU J.S. 20). The two situations are not comparable. The telephone company is not a party to a telephone conversation and the disclosure of the conversation to the telephone company and its employees is not necessary in order to facilitate the transmission of the communication. In these circumstances, a party to a conversation has a reasonable expectation that his conversation will not be "seized" by any third party. *Katz* v. *United States,* 389 U.S. 347, 352. Here on the other hand the disclosure of information to the bank, its employees, and others is made voluntarily by the customer. Such disclosure is essential to the services rendered by the bank, and so is the recording and retention of much of the information disclosed. There is, as we have shown, no basis for the assertion of any Fourth Amendment claim in these circumstances.

3. THE AMERICAN CIVIL LIBERTIES UNION (ACLU J.S. NO. 72-1196)

The ACLU alleges that the provisions of Title I have a "chilling effect" on the exercise of "the First Amendment's right of association" (ACLU J.S. 22).

The basis of this claim is that most ACLU members pay their dues "in the form of checks drawn on banks in California, throughout the United States and even in foreign countries" (ACLU J.S. 22). The ACLU claims that Title I of the Act, and the regulation promulgated thereunder, which require these banks to retain either the original or a copy of checks drawn by depositors "in excess of $100" (31 C.F.R. 103.34 (4); G. J.S. App. 117), would "likely" cause a person to "hesitate" before making a contribution to it (ACLU J.S. 22).[13]

The claim asserted by the ACLU, resting as it does on "allegations of a subjective 'chill' " on the exercise of First Amendment rights (*Laird* v. *Tatum*, 408 U.S. 1, 13), is insufficient to invoke the jurisdiction of a federal court. In *Laird* v. *Tatum*, *supra*, the Court held that "the jurisdiction of a federal court may [not] be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental

[13] This claim was not asserted in the complaint. The ACLU alleged in its complaint that *it* maintained accounts in various California banks (G. J.S. App. 38) and claimed that the authority delegated to the Secretary was so broad that he *could* promulgate regulations which would make it impossible for the *ACLU* to "reasonably and effectively maintain the anonymity of its members and contributors" (G. J.S. App. 39). This claim has now been abandoned in favor of a claim that the ACLU is being injured because most of its members pay by check, desire anonymity, and will "hesitate" to contribute to the ACLU if they know that *their* banks keep records.

purpose" (408 U.S. at 10). "Allegations of a subjective 'chill,'" the Court held, "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions'" (408 U.S. at 15).

The claim here, as in *Tatum*, rests simply on the inadequate allegation that the exercise of First Amendment rights "is being chilled by the mere existence without more, of a governmental investigative and data-gathering activity" (408 U.S. at 10). There is no "claim of specific present *objective* harm or a threat of specific future harm" to any ACLU member (408 U.S. at 15, emphasis added); nor is any member "either presently or prospectively subject to the regulations, proscriptions, or compulsions" of Title I being challenged (408 U.S. at 11). The holding in *Laird* v. *Tatum, supra*, would therefore preclude a suit by an ACLU member seeking to challenge the provisions of Title I, and the ACLU Jurisdictional Statement has apparently abandoned such a challenge on behalf of the individual appellees, Stark and Marson (G. J.S. App. 39). Since the ACLU's standing to raise this First Amendment claim is essentially derivative (*NAACP* v. *Alabama*, 357 U.S. 449, 458–459) it likewise lacks standing to challenge the Act.[13]

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[13] Even assuming standing to challenge the Act on First Amendment grounds, we submit that the ACLU's claims are without merit. Unlike cases such as *NAACP* v. *Alabama*, 357 U.S. 449, this is not a case in which the membership list of an organization is sought, nor could such disclosure possibly result from the operation of the provisions of the Act—barring an

II. TITLE II OF THE BANK SECRECY ACT IS NOT UNCONSTITUTIONAL

Title II of the Bank Secrecy Act (Currency and Foreign Transactions Reporting Act) has the same declared purpose as Title I, Sec. 202 (31 U.S.C. 1051). Chapter 3 of Title II (Secs. 231–235 (31 U.S.C. 1101–1105)),[14] requires persons to report transportations of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the transportation or receipt involves more than $5,000. It also provides that the reports must indicate the legal

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examination of every microfilmed check drawn by every bank customer in the United States. Indeed, even such an exercise would be unavailing since the regulations exempt from the coverage of the Act checks issued or drawn "for $100 or less" (31 C.F.R. 103.34(b)(3); G. J.S. App. 116). Moreover, the Bank Secrecy Act does not compel any individual to disclose information regarding his political affiliation nor does it by terms compel any bank to disclose any information. Since there is no assurance that most banks would not continue to keep similar records of checks drawn or issued in excess of $100, even without the compulsion of the Act, any possible "chilling effect" of the Act on contributions to the ACLU is too remote and speculative to call into question the Act's constitutional validity.

[14] Chapter 2 of Title II, Secs. 221–223 (31 U.S.C. 1081–1083) is not involved in these appeals. It authorizes the Secretary to prescribe regulations requiring reports of currency transactions—i.e., transactions involving the payment, receipt, or transfer of United States currency or other monetary instruments—with domestic financial institutions. These provisions, which are detailed in our Jurisdictional Statement (G. J.S. 5–8), were declared unconstitutional by the district court below, and are the subject of the government's appeal in No. 72-1073.

capacity in which the person filing the report is acting with respect to such transportation, the origin, destination and route of such transportation, the identities of the persons from whom such instruments were received or to whom they are to be delivered, and the amounts and types of monetary instruments involved. The implementing Regulations (31 C.F.R. 103.23, 103.25) establish certain exemptions from the reporting provisions, such as for Federal Reserve Banks, specified routine shipments of monetary instruments by banks, and securities brokers and dealers. Form 4790, which is prescribed for making such reports, is set forth in Appendix C, *infra*, pp. 29–30.

Chapter 4 of Title II (Secs. 241–242 (31 U.S.C. 1121–1122)) authorizes the Secretary to prescribe Regulations requiring United States citizens and residents and persons in the United States and doing business therein to file reports of transactions and maintain records [15] of their relationships with foreign financial agencies. Section 241 requires that such reports show the identity of the parties to the transaction or relationship, the legal capacity in which such parties are acting, the identity of any real parties in interest for whom they may be acting, and the nature of the transaction or relationship required to be reported. The Secretary has exercised this authority by

[15] Sec. 241(b) (31 U.S.C. 1121(b)) provides that persons required to maintain records under the provisions of that Section need not produce or disclose the contents of such records except in compliance with a duly authorized summons or subpoena or as may otherwise be required by law.

requiring persons subject to the jurisdiction of the United States (other than foreign subsidiaries of United States persons) having a financial interest in, or signature or other authority over foreign financial accounts to report such relationships on their federal income tax returns (31 C.F.R. 103.24),[10] and further requiring such persons to maintain specified records with respect to such accounts for a period of five years (31 C.F.R. 103.32).

Appellants Lieberman, Harwood, Bruier and Durell challenge the foreign reporting provision of Title II and the Regulations promulgated thereunder. These appellants alleged in the complaint that they each "maintain a financial interest in and signature authority over one or more bank accounts in foreign countries" (G. J.S. App. 35), and each claimed that the provisions of Title II of the Act, which require United States citizens, residents and businessmen to report information concerning their bank accounts in foreign countries, violate their rights "to be free of unreasonable searches and seizures and rights of privacy" (G. J.S. App. 41). Appellant Lieberman also alleged in the complaint that he has "repeatedly in the recent past transported, mailed or shipped * * * one or more mandatory instruments exceeding $5,000 in value from the United States to places outside the United States and expects to have reason to do so again in the near future" (G. J.S. App. 35). He claimed that the compulsory disclosure of these trans-

[10] A copy of Form 4683 which is prescribed for this purpose is set forth in Appendix B, *infra*, pp. 27–28.

actions would violate his "right to be free of unreasonable searches and seizures and rights of privacy" (G. J.S. App. 41). These appellants did not allege that Title II violated their privilege against self-incrimination, although their Jurisdictional Statement challenges Title II on these grounds as well (ACLU J.S. 12–13). These claims are without merit.

1. The provisions of Title II were enacted by Congress principally in exercise of its plenary power under the Commerce Clause "to regulate Commerce with foreign Nations, and among the several States" (Art. I, Sec. 8, cl. 3). The power delegated to Congress over "commerce with foreign Nations" contemplates an even "broader" exercise of authority than the delegation of power to regulate interstate commerce. *Atlantic Cleaners and Dyers* v. *United States*, 286 U.S. 427, 434.

There is no doubt that under the Commerce Clause the power to regulate the conduct of those employing the channels of foreign commerce to engage in financial transactions—which extends to prohibiting such transactions altogether[17]—encompasses the authority to enact reasonable regulations intended to prevent the channels of foreign commerce from being employed for the purpose of violating United States criminal, tax and regulatory laws or for the purpose of concealing the fruits of United States criminal activity and converting those fruits into usable forms of credit. See H. Rep. No. 91-975, *supra*, pp. 10, 12–13; S. Rep. No. 91-1139, *supra*, pp. 1–4.

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[17] *Gibbons* v. *Ogden*, 9 Wheat. 1, 191–192; *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48, 57; *Atlantic Cleaners and Dyers* v. *United States*, 286 U.S. 427, 434.

The claim that the provisions of Title II requiring disclosure of information regarding such activities is an unreasonable search and seizure is insubstantial. The Fourth Amendment does not shield a person from keeping records and responding to inquiries that relate to activities in an area over which Congress has such broad regulatory power. As the Court held in *Shapiro* v. *United States*, 335 U.S. 1, 32–33 in rejecting a similar claim:

> It is not questioned here that Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the licensing and recordkeeping requirements of the Price Control Act represent a legitimate exercise of that power. Accordingly, * * * the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." [Footnotes omitted.]

Accord: *Davis* v. *United States*, 328 U.S. 582, 589–590; *United States* v. *Darby*, 312 U.S. 100, 125; *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 174–176; *Rodgers* v. *United States*, 138 F. 2d 992, 996 (C.A. 6); *Bartlett Frazier Co.* v. *Hyde*, 65 F. 2d 350, 351–352 (C.A. 7). Cf. *Isbrandtsen-Moller Co.* v. *United States*, *supra*, 300 U.S. at 145.

Moreover, there is no basis for appellants' suggestion that Title II is an unreasonable exercise of the authority granted Congress under the Commerce Clause because it requires "exposure of all" international monetary transactions in order to uncover

"a few sinister" ones (ACLU J.S. 12). Title II requires reports not of all international transactions, but only of certain transactions involving the physical transportation of monetary amounts in excess of $5,000. It is true that all persons having financial interests in foreign accounts must report that fact on their income tax return, but the information required is quite limited, consisting only of the names of the taxpayer and the nature and size of his accounts.[18]

There was ample evidence before Congress regarding the importance of these reporting and recordkeeping provisions to the enforcement of criminal, tax, and regulatory laws. The Senate Committee in charge of the bill specifically endorsed the conclusions of Justice Department officials that the reports of financial transactions would be "'of immense importance to law enforcement.'" Specifically, the Committee noted the assistance the reports would render in uncovering violations of gambling, narcotics, loan sharking, and like crimes. S. Rep. No. 91–1139, *supra*, pp. 6–7. Assistant Secretary of the Treasury Rossides testified that the reports were also needed to prevent evasion of the

[18] Form 4790, Appendix C, *infra*, pp. 29–30, requires disclosure of the fact of a reportable export or import of more than $5,000 in currency or monetary instruments, the identity of the person filing the report and persons on behalf of whom he is acting, a description of the currency or monetary instruments involved, and the method of transportation or shipment. Form 4683, Appendix B, *infra*, pp. 27–28, which is to be filed annually with a person's federal income tax return, requires a disclosure of the fact that a person maintained signature authority over, or a financial interest in, foreign accounts, and, in certain instances where the value of such financial interests exceeded $10,000, the nature of the account, the name in which it was maintained, its maximum value, and the identity of the bank.

requirements that banks report large currency deposits or withdrawals. Hearings before the House Committee on Banking and Currency on Foreign Bank Secrecy and Bank Records, 91st Cong., 1st and 2d Sess., p. 61. An official of the Department of Defense testified that the reports would assist in uncovering frauds on the armed forces. *Id.* at 138. And the Senate Committee noted that the reporting requirement would deter criminals from transporting funds into or out of the country in aid of criminal activity since it would provide a penalty for failure to report the transportations. S. Rep. No. 91–1139, *supra*, p. 7; see also Hearings before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency on Foreign Bank Secrecy, 91st Cong., 2d Sess., p. 65.

The legislative materials respecting the importance for law enforcement purposes of the foreign financial account reporting provisions are similar. The Committee Reports detail the many serious types of violations of United States laws which have been made possible through accounts in foreign banks from which United States law enforcement officials cannot obtain information or records. Violations of the securities, tax, antitrust, and currency laws of the United States were among those specifically mentioned. H. Rep. No. 91–975, *supra*, p. 12; S. Rep. No. 91–1139, *supra*, pp. 2–4, 8. The Committee concluded that without such reports and records, numerous violations of United States laws would go undetected.[19] S. Rep. No. 91–

[19] The testimony of officials of the Executive Branch similarly expressed the need for the information on foreign financial accounts. For example, Assistant Secretary of the Treasury Ros-

1139, *supra*, p. 8; H. Rep. No. 91-975, *supra*, pp. 12-13. In contrast with these important law enforcement objectives, the burden imposed by these provisions is minimal, since only limited information regarding the number, size and type of accounts is required.

2. Appellants' challenge to Title II on the grounds that it offends the Fifth Amendment's privilege against self-incrimination requires only a brief response. While we believe that the provisions of Title II are substantially different in nature and purpose from those in such cases as *Marchetti* v. *United States*, 390 U.S. 39, and *Haynes* v. *United States*, 390 U.S. 85, the challenge asserted here is plainly premature and not ripe for judicial review. The individual appellants who claim to be affected by the operation of Title II made no allegation in their complaint that compliance with the Act would require them to incriminate themselves and none of the other complainants raised such a claim. "The privilege against self-incrimination is one which normally must be claimed [only] by the individual who seeks to avail himself of its protection" *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107. Appellants' reliance on *Boyd* v. *United States*, 116 U.S. 616, is misplaced. "In *Boyd*, production had been ordered, objected to, and, the Court held, unconstitutionally compelled. *There is*

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sides testified that such information would be of "great help in our efforts to stop smuggling of narcotics into the United States and our general efforts against organized crime." House Hearings, *supra*, p. 58.

nothing in the case which justifies advisory adjudication of self-incrimination questions prior to the time when the demand for information has been, at the least, made and resisted." Communist Party, supra, 367 U.S. at 110 (emphasis added).

CONCLUSION

The order of the district court should be affirmed insofar as it denied the injunctive relief sought by the appellants.

Respectfully submitted.

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May 1973.

APPENDIX A

Tax-related Statutes and Regulations Requiring Recordkeeping or Reporting

Sections 1.162–17 and 1.274–5 of the Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.) (employers must keep records of payments for employee travel and entertainment expenses);

Section 1.521–1 of the Regulations (cooperative must keep records of patronage dividends allocable to patrons);

Section 1.857–6 of the Regulations (real estate investment trusts must keep records of shareholders who refuse to submit certain statements);

Sections 1.1361–10, 1.1361–14, 1.1375–4 and 1.1375–6 of the Regulations (small business corporations must keep several types of records respecting their shareholders);

Sections 1.1441–6, 1.1461–1 and 1.1461–2 of the Regulations (payors must keep withholding records of payments to nonresident aliens);

Section 31.3401(a)–1 of the Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.) (employers must keep records of sick pay to employees);

Section 6001 of the Internal Revenue Code of 1954 and Section 31.6001–5 of the Treasury Regulations on Employment Tax (employers must keep records of income tax withholding);

Section 49.4253–11 of the Treasury Regulations on Facilities and Services Excise Tax (1954 Code) (26 C.F.R.) (telephone companies must keep records of communications taxes paid by customers);

Sections 42.4292–1(b) and 49.4261–6(e) of the Treasury Regulations on Facilities and Services Excise Tax (common carriers must keep records of tax payments of customers);

Section 45.4804–10 of the Treasury Regulations on Miscellaneous Stamp Tax (1954 Code) (26 C.F.R.) (manufacturers of white phosphorous matches must keep records of names of customers);

Section 147.8–4(d) of the Temporary Treasury Regulations under the Interest Equalization Tax Act (1954 Code) (26 C.F.R.) (custodians and nominees must keep records of owners of foreign stock or debt obligations);

Section 173.15 of the Treasury Regulations on Returns of Substances, Articles, or Containers (1954 Code) (26 C.F.R.) (sellers of materials used for producing distilled spirits must maintain records);

Section 6041(a) of the Code (businesses required to report certain income payments to third parties);

Section 6042 of the Code (corporations must report certain dividend payments made to third parties);

Section 6044 of the Code (cooperatives must report patronage dividend payments);

Section 6045 of the Code (brokers may be required to report customers' gains and losses);

Section 6049 of the Code (banks must report payments of interest made to depositors, etc.).

APPENDIX B

Form **4683** (Rev. Nov. 1971)
Department of the Treasury
Internal Revenue Service

U.S. Information Return on Foreign Bank, Securities, and Other Financial Accounts

To Attach to your tax return.

For the calendar year 19..... or other taxable year beginning ..... 19....., and ending ..... 19....

Complete this form showing your relationship during the taxable year to one or more bank, securities or other financial accounts in foreign countries. Use additional sheets if necessary.

Name(s) as shown on return	Tax identifying number (Social security number or employer identification number if other than individual)	Check type of return ☐ Individual ☐ Partnership ☐ Corporation ☐ Small business corporation ☐ Fiduciary

NOTE: Ownership of 50% or less of the stock of any corporation which owns one or more foreign accounts is not a "financial interest" in those accounts and need not be reported by the shareholder. Accounts in a U.S. military banking facility operated by a U.S. financial institution are not foreign accounts and need not be reported.

If you wish, you may also submit any other information or explanation not required by this form concerning your interest in or authority over an account.

PART I Check all appropriate boxes. See instruction F for definition of "financial interest." Use additional sheets if necessary.

1. ☐ I had signature authority or other authority over one or more foreign accounts, but I had no "financial interest" in such accounts (see instruction F). Indicate for those accounts:
   Name and tax identifying number (if any) of each owner .....
   Address of each owner .....
   (Do not complete Part II for these accounts.)

2. ☐ I had a "financial interest" in one or more foreign accounts, but the total maximum value of those accounts (see instruction H) did not exceed $10,000 at any time during the taxable year. (If you checked this box, do not complete Part II.)

3. ☐ I had a "financial interest" in 25 or more foreign accounts. (If you checked this box, do not complete Part II.)

4. ☐ I had a "financial interest" in less or more but fewer than 25 foreign accounts, and the total maximum value of those accounts (see instruction H) exceeded $10,000 during the taxable year. (If you checked this box, complete Part II.)

PART II Complete this part ONLY if you checked Item 4, and provide information in Items 5 through 10 for each account. Please use a separate Form 4683 for each account or use your own schedule to provide this information.

To avoid duplicate reporting on accounts owned by a corporation, partnership, or trust required to file this form, you may follow the procedure in instruction J by checking this box ☐ and completing the statement on the back of this form.

5. Name in which account is maintained	6. Name of bank or other person with whom account is maintained
7. Number and other account designation, if any	8. Address of office or branch where account is maintained

9. Type of account. (If not certain of English name for the type of account, give the foreign language name and describe the nature of the account. Attach additional sheets if necessary.)
   ☐ Savings, demand, or checking ☐ Securities ☐ Other (specify) .....

10. Maximum value of account (see instruction H)
    ☐ Under $50,000 ☐ $50,000 to $100,000 ☐ Over $100,000 ☐ Unable to determine (attach explanation)

Instructions

A. Who Must File a Return.—Each United States person who has a financial interest in or signature authority or other authority over a bank, securities, or other financial account in a foreign country at any time during a taxable year, must report that relationship for each taxable year. Do this by checking the appropriate box on the Form 1040, 1041, 1065, 1120, 1120L, 1120M, or 1120S you file for the taxable year and by filing with that return an information return on Form 4683 for that year.

B. United States Person.—The term "United States person" means (1) a citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, and (4) a domestic estate or trust.

C. Account in a Foreign Country.—A "foreign country" includes all geographical areas located outside the United States, its possessions, and Puerto Rico.

Report any account maintained with a branch, agency, or other office of a bank (except a military banking facility as defined in instruction D) or broker or dealer in securities that is located in a foreign country, even if it is a part of a United States bank or other institution. Do not report any account maintained with a branch, agency, or other office of a foreign bank or other institution that is located in the United States, its possessions, or Puerto Rico.

D. Military Banking Facility.—Do not consider as an account in a foreign country an account in an institution known as a "United States military banking facility" (or "United States military finance facility") operated by a United States financial institution un-

der designation by the United States Treasury to serve U.S. Government installations abroad, even if the United States military banking facility is located in a foreign country.

E. Bank, Securities, or Other Financial Account.—The term "bank account" means a savings, demand, checking, deposit, loan, or any other account maintained with a person engaged in the business of banking. It includes certificates of deposit.

The term "securities account" means an account maintained with a person who buys, sells, holds, or trades stock or other securities for the benefit of another.

The term "other financial account" means any other account maintained with any person who accepts deposits, exchanges or transmits funds, or acts as a broker or dealer for future transactions in any commodity on (or subject to the rules of) a commodity exchange or association.

F. Financial Interest.—A financial interest in a bank, securities, or other financial account in a foreign country means an interest described in either of the following two paragraphs:

(1) A United States person has a financial interest in each account for which he is the owner of record or has legal title, whether the account is maintained for such person's own benefit or for the benefit of others including one or more United States persons. If an account is maintained in the name of two persons jointly, or if several persons each own a partial interest in an account, each of those United States persons has a financial interest in that account.

(2) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is: (a) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; (b) a corporation in which the United States person owns directly or indirectly more than 50 percent of the voting stock or more than 50 percent of the total value of shares of stock; (c) a partnership in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income); or (d) a trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets, or from which such person receives more than 50 percent of the current income.

G. Signature or Other Authority Over an Account.—

Signature Authority.—A person has signature authority over an account if he can control the disposition of money or other property in it by delivery of a document containing his signature (or his signature and that of one or more other persons) to the bank or other person with whom the account is maintained.

Other authority exists in a person who can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

H. Account Valuation.—For items 2, 4, and 10, the maximum value of an account is the largest amount of currency and non-monetary assets that appears on any quarterly or more frequent account statement issued for the applicable calendar year. If periodic account statements are not so issued, the maximum account asset value is the largest amount of currency and non-monetary assets in the account at any time during the taxable year. Convert foreign currency by using the official exchange rate at the end of the taxable year. In valuing currency of a country that uses multiple exchange rates, use the rate which would apply if the currency in the account were converted into United States dollars at the close of the taxable year.

The value of stock, other securities or other non-monetary assets in an account reported on Form 4683 is the fair market value at the end of the taxable year, or if withdrawn from the account, at the time of withdrawal.

For purposes of items 2 and 4, if you had a financial interest in more than one account, each account is to be valued separately in accordance with the foregoing two paragraphs.

If you had a financial interest in one or more but fewer than 25 accounts, and you are unable to determine whether the maximum value of these accounts exceeded $10,000 at any time during the taxable year, check Item 4 (do not check Item 3) and complete Part II for each of these accounts.

I. United States Persons with Only Authority Over but No Interest in an Account.—Except as provided in the following paragraph, you must state the name, address, and tax identifying number (if any) of each owner of an account over which you had authority, but if you check Item 3 for more than one account of the same owner, you need identify the owner only once.

If you check Item 1 for one or more accounts in which no United States person had a financial interest, you may state on the first line of this Item, in lieu of supplying information about the owner, "No U.S. person had any financial interest in the foreign accounts." This statement must be based upon the actual belief of the person filing this form after he has taken reasonable measures to ensure its correctness.

If you check Item 3 for accounts owned by a domestic corporation and its domestic and/or foreign subsidiaries, you may treat them as one owner and write in the space provided, the name of the parent corporation, followed by "and related entities," and the tax identifying number and address of the parent corporation.

J. Avoiding Duplicate Reporting.—If you had a financial interest (as defined in instruction F(2)(b), (c) or (d)) in one or more accounts identified in Item 4 which are owned by a domestic corporation, partnership or trust which is required to file Form 4683 with respect to these accounts, in lieu of completing Items 5 through 10 for each such account you may check the box in the introduction to Part II and fill in the statement below.

K. Providing Additional Information.—Any person checking one or more items of Part I of this form, when requested by the Internal Revenue Service, shall provide information concerning each account reported in Part I that is necessary to determine such person's Federal income tax liability.

L. Penalties.—For criminal penalties for failure to file a return or to supply information, and for filing a false or fraudulent return, see sections 7203 and 7206 of the Internal Revenue Code.

Statement (Pursuant to Instruction J) Relating to a "Financial Interest" in Foreign Accounts Owned by a Domestic Corporation, Partnership or Trust

I had a "financial interest" in one or more foreign accounts owned by a domestic corporation, partnership or trust which is required to file Form 4683.

Name and tax identifying number of each such corporation, partnership or trust .....

Address of each such corporation, partnership or trust .....

(Do not complete Items 5 through 10 on the front of this form for these accounts.)

APPENDIX C

Form **4790**
(April 1972)
Department of the Treasury
Internal Revenue Service

Report of International Transportation of Currency or Monetary Instruments

Date of currency or monetary instrument activity ..... 19..

This form is to be filed with the Bureau of Customs

PART I Person Transporting, Mailing, Shipping, or Receiving a Monetary Instrument
(Items 5 through 11 are applicable to alien individuals only)

1. Name (last or family, first, and middle) (if business show business name)
2. Identifying number (see instructions)
3. Check whether the currency or monetary instrument was:
   (a) ☐ Received
   (b) Shipped or mailed:
   ☐ Into the U.S.
   ☐ From the U.S.
   (c) Carried by traveler (check applicable block and enter city):
   ☐ Entering the U.S.— City
   ☐ Leaving the U.S.— City
4. Permanent address in United States or abroad
5. Address while in the United States
6. Date of birth (month, day, and year)
7. Alien registration card number, if any
8. VI-s date
9. Place United States visa was issued
10. Of what country are you a citizen or subject
11. Passport number and country
12. Were you acting as an agent, attorney, or in other capacity for anyone in this currency or monetary instrument activity? ☐ Yes ☐ No
If "Yes," please complete the following:
(a) Name of person in whose behalf you are acting
(b) Complete address of that person
(c) Business activity, occupation or profession of that person

PART II Currency and Monetary Instrument Information (See Instructions)

13. Type and amount of currency and/or monetary instruments
   (a) ☐ Coins (specify amount) $
   (b) ☐ Currency (specify amounts)
   (c) ☐ Stamps (specify type and amount)
   (d) Total amount (add lines (a), (b) and (c)) $
14. If other than United States currency is involved, please complete the following:
   (a) Currency name
   (b) Country
   (c) Equivalent in United States dollars (specify amount) $
15. Name of person from whom the currency or monetary instrument was received (to be completed by recipients only)
16. If the currency or monetary instrument was mailed, shipped, transported or carried, please complete the following:
   (a) Method of shipment
   (b) Name of transporter or carrier

Under penalties of perjury, I declare that I have examined this report, and to the best of my knowledge and belief it is true, correct and complete.

Sign Here ▶ _____
Signature

_____ _____
Title (Owner, etc.) Date

Instructions

This report is required by Treasury Department regulations (31 Code of Federal Regulations 103).

Who Must File.—Beginning July 1, 1972, each person who physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported. Also each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed shall make a report.

Exceptions.—The following persons are not required to file reports: (1) a Federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a traveler's check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

When and Where to File:

A. Recipients.—Each person who receives currency or other monetary instruments shall file Form 4790, within 30 days after receipt, with the Customs officer in charge at any port of entry or departure or by mail with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226.

B. Shippers or Mailers.—If the currency or other monetary instruments did not accompany the person entering or departing the United States, Form 4790 may be filed by mail on or before the date of entry, departure, mailing, or shipping with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226.

C. Travelers.—Travelers shall file Form 4790 at the time of entry into the United States or the time of departure from the United States with the Customs officer in charge at any Customs port of entry or departure.

An additional report of a particular transportation, mailing, or shipping of currency or other monetary instruments, is not required if a complete and truthful report has already been filed. However, no person otherwise required to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed. Forms may be obtained from any Internal Revenue or Bureau of Customs office.

Penalties.—Civil and criminal penalties are provided for failure to file a report, supply information, and for filing a false or fraudulent report. In addition, the currency or monetary instrument may be subject to seizure and forfeiture. See sections 103.47, 103.48 and 103.49 of the regulations.

Definitions

Bank.—Each agent, agency, branch or office within the United States of a foreign bank and each agency, branch or office within the United States of any person doing business in one or more of the capacities listed:

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

Foreign Bank.—A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Broker or Dealer in Securities.—A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Identifying Number.—Individuals should enter their social security number, if any. However, aliens who do not have a social security number should enter passport or alien registration number. All others should enter their employer identification number.

Investment Security.—An instrument which: (1) is issued in bearer or registered form; (2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; (3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and (4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary Instruments.—Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person.—An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

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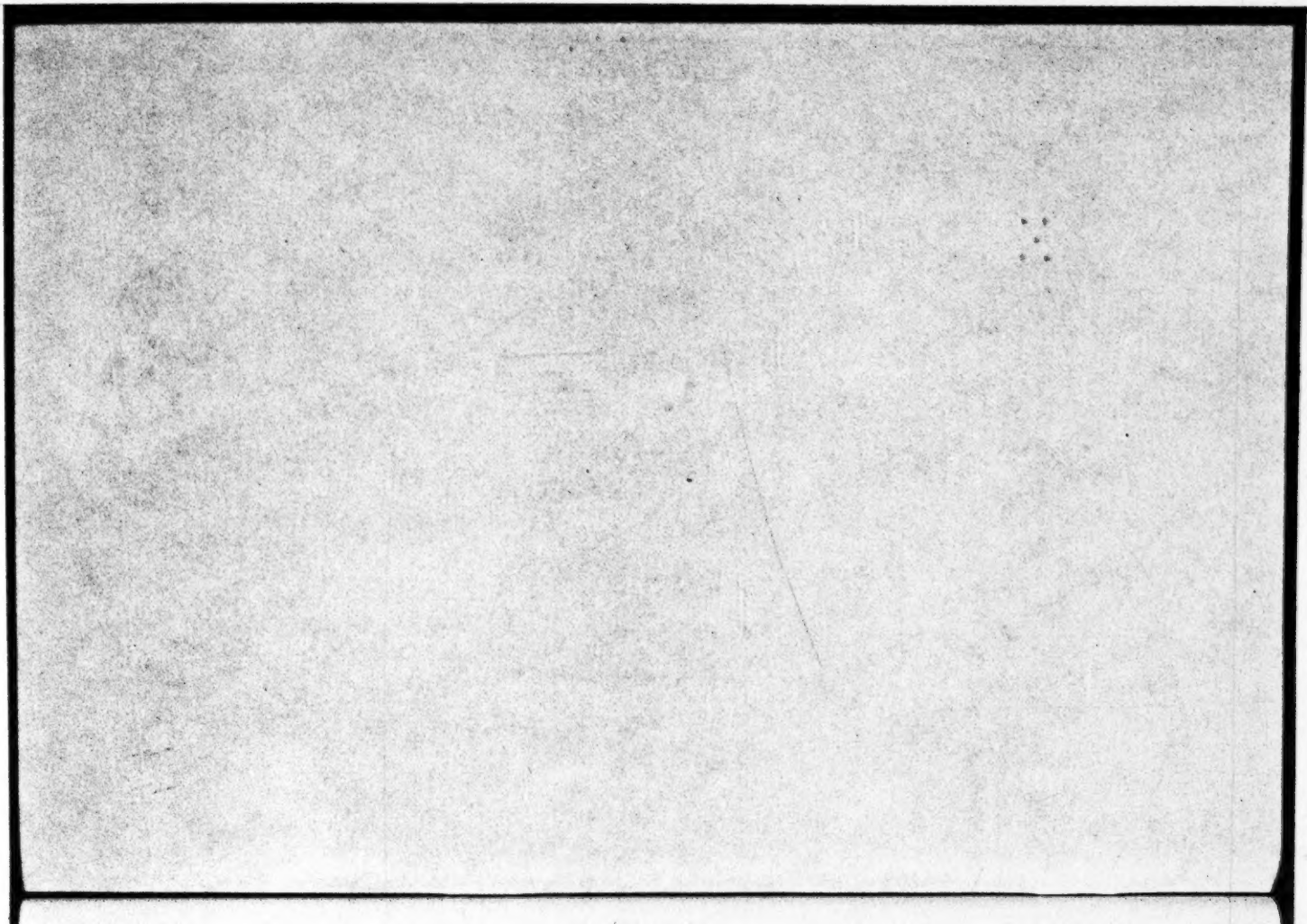

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1073

GEORGE P. SHULTZ, Secretary of the Treasury, and
All Other Defendants in the District Court,
Appellants,

vs.

THE CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO DISMISS OR AFFIRM

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Subject Index

In the Supreme Court
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OCTOBER TERM, 1972

No. 72-1073

GEORGE P. SHULTZ, Secretary of the Treasury, and All Other Defendants in the District Court,
Appellants,

vs.

THE CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO DISMISS OR AFFIRM

Appellees[1] respectfully move this Court to dismiss the appeal herein or, in the alternative, to affirm the

[1] "Appellees" herein are all appellees named by the Government in its Jurisdictional Statement except the California Bankers Association.

judgment of the United States District Court for the Northern District of California on the ground that it is manifest that the question on which the decision of the cause depends is so insubstantial as not to need further argument.

ARGUMENT

THE QUESTION PRESENTED IS INSUBSTANTIAL BECAUSE THE STATUTES AND REGULATIONS INVALIDATED BY THE DISTRICT COURT PLAINLY INVADE THE RIGHT OF PRIVACY OF BANK CUSTOMERS AND CONSTITUTE A MASSIVE SCHEME OF UNREASONABLE SEARCHES AND SEIZURES.

The District Court enjoined the domestic reporting requirements of the Bank Secrecy Act—the only provisions of the Act at issue herein—because they unreasonably invade the right of privacy . . . particularly the Fourth Amendment. . . ." (JS-60), and because they authorize the Secretary "to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry. . . ." *Ibid.*

The heart of the Government's appeal[2] is that the District Court "improperly ignored the Regulations" (JS-20) that had been promulgated under the Act, forgot somehow that they had not been drafted as

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[2]Two other appeals from the same order are presently pending before this Court: *Stark v. Shultz*, No. 72-1196, O.T. 1972; and *California Bankers Association v. Shultz*, No. 72-985, O.T. 1972.

intrusively as they might have been, and therefore rendered a decision premised on "hypothetical" but unlikely contingencies.

Actually the District Court did just the opposite; it read the regulations carefully and realized that what the Government now claims are the actual limitations of the reporting requirements were themselves hypothetical because one of the regulations, 31 C.F.R. §103.45, made all the others instantly, infinitely, unreviewably expandable by the Secretary at his whim. That regulation permitted the Secretary "in his sole discretion" to "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify" all the other regulations by simple "written order or authorization" effective immediately. That Regulation, in effect when the District Court rendered its decision, was central to its reasoning (see JS-49) and was one of the central targets of appellees' attacks. Yet in the District Court the Government did not commit one word to paper concerning the meaning or validity of that Regulation.[3] It was not until its Jurisdictional Statement in this Court that the Government even mentioned Regulation 103.45, and then only to note (JS-22, n. 19) that it had been amended to delete the portions over which the District Court and the appellees "expressed concern."

Against that background it is hardly persuasive for the Government to urge that because other Regula-

[3]The Secretary was criticized in Congress for refusing to predict how that power would be used (see 116 Cong.Rec. 16963-64 (1970).

tions then limited the domestic transactions required to be reported to $10,000 (JS 10-11) and to currency (JS 12-14) that consideration of any other application was "hypothetical".

Nor does the Government's Jurisdictional Statement explain why the domestic reporting requirements are consistent with the Fourth Amendment,[4] even assuming that they could or would be limited to cash transactions exceeding $10,000. There is nothing inherently suspicious about such transactions; their mere existence does not amount to probable cause to believe anything. Yet the statutes and regulations at issue here require the seizure of the details of those transactions simply so the Government can store up the information in case it is later needed to satisfy some undefined future curiosity. Abhorrence to such mass seizures is at the heart of the Fourth Amendment. See generally, *Stanford v. Texas,* 379 U.S. 476, 481-85 (1965); *Boyd v. United States,* 116 U.S. 616, 622-30 (1886).

The Government argues that persons engaging in such transactions do not have a reasonable expectation of privacy because "banks have been reporting such transactions for more than twenty-five years" (JS-17) under the Trading with the Enemy Act, which the Government describes (JS-15) as requiring reports of "all" currency transactions which banks

[4]The constitutional flaws in the reporting requirements that are separate from the Fourth Amendment are discussed in detail in Appellees' Jurisdictional Statement in *Stark v. Shultz,* No. 72-1196, O.T. 1972, at pp. 12-14 and 21-23; we incorporate those arguments by reference here rather than repeat them.

thought were not "commensurate with the legitimate and customary conduct of the business, industry or profession of the person or organization concerned" (JS-15). If so, then it is hard to see why Congress bothered to pass the Bank Secrecy Act, why the Government has bothered to appeal the order of the District Court (because it already has other means of getting the information it wants), or why the decision of the court below "creates a serious gap in the Bank Secrecy Act that significantly impairs the statutory scheme. . . ." (JS-9).

The answer, of course, is that the two reporting schemes are very different. Congress, claims the Government, wanted "to strengthen the statutory basis for requiring such reports" (JS-16). It wanted "more definite standards" and to eliminate "the subjectivity of the earlier regulations" (*ibid.*). The old statutory scheme permitted the banks to report or not *subjectively,* unlike the new one, and there is no evidence in this record that any substantial reporting was ever done under that subjective standard by any banks anywhere at any time. The old scheme required a judgment of whether the transaction exceeded "legitimate" business requirements, while the new one does not. In the total absence of evidence and given the obvious differences between the requirements of the Trading with the Enemy Act and the Bank Secrecy Act, the Government's assertion that these reports have been made for a quarter of a century is not only baseless, but actually contradicts the Government's expressed concern over the importance of its appeal.

CONCLUSION

The Government's appeal is insubstantial and should be dismissed or, in the alternative, the portion of the District Court's order appealed from by the Government should be affirmed.

Dated, San Francisco, California,
June 26, 1973.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72 - 1073

GEORGE P. SHULTZ, Secretary of the Treasury, and All Other Defendants in the District Court,
Appellants,

v.

THE CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., et al.
Appellees.

On Appeals From the United States District Court
For The Northern District of California

Motion to Affirm

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On Appeals From the United States District Court For The Northern District of California

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Motion to Affirm

Pursuant to Rule 16(1) of the Rules of this Court, appellee, The California Bankers Association, moves that the portion of the order of the District Court from which the government appeals be affirmed.

INTRODUCTION

This is in reply to the Government's appeal from an order of a three-judge District Court enjoining in part enforcement and operation of the Bank Secrecy Act.[1]

There are three parts to the Bank Secrecy Act. Title I and its implementing regulations require banks and other financial institutions to copy and retain virtually every piece of paper that passes through the American banking system.[2] Title II and its implementing regulations require banks and other financial institutions to report, automatically, certain domestic and foreign currency transactions to the Government.[3]

In October, 1972, a three-judge District Court for the Northern District of California found the Act's domestic currency provisions unconstitutional and enjoined their enforcement. The District Court declined, however, to enjoin enforcement of the Act's recordkeeping and foreign currency reporting requirements.[4]

The Government has appealed from that portion of the District Court's order enjoining enforcement of the Act's domestic currency provisions.[5] The California Bankers

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1. Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114 (12 U.S.C. § 1829b, § 1951-1959; and 31 U.S.C. § 1051-1122). For the convenience of the Court and counsel, the Bank Secrecy Act is included with this brief as Appendix A.

2. See Sections 101 through 129 of the Act; and see C.F.R. § 103.31-103.37 (1972). For the convenience of the Court and counsel, the Bank Secrecy Act regulations are included with this brief as Appendix B.

3. See Sections 201 through 242 of the Act; and see 31 C.R.F. § 103.21-103.26 (1972).

4. The District Court's memorandum decision is included with this brief as Appendix C.

5. The Government's jurisdictional statement was filed with the Court on February 3, 1973. See *George P. Shultz v. The California Bankers Ass'n., et al.*, No. 72-1073.

Association and Fortney H. Stark, Jr., *et al.*, have appealed the District Court's refusal to enjoin enforcement of the Act's recordkeeping requirements.[6]

In an age when there are means available to abolish a citizen's seclusion and repose, these appeals test the sanctity of personal privacy.

STATEMENT

In October, 1970, Congress enacted the Bank Secrecy Act. The Act was adopted "to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[7] It has never been suggested that the Act is needed to regulate banks and other financial institutions. The Act is aimed instead at their respective customers.[8]

The Act authorizes regulations compelling banks and other financial institutions to identify (1) each person having an account; (2) each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any account; (3) any person, not already identified, for whose account any check, draft, or similar instrument has been received for deposit or collection; and (4) to microfilm or otherwise reproduce *all* checks, drafts, or similar instruments drawn on or presented for payment or received for deposit or collection. (Section 101(c) and (d).)

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6. The California Bankers Association's jurisdictional statement was filed on January 12, 1973. See *The California Bankers Assn. v. George P. Shultz, et al.*, No. 72-985. A jurisdictional statement was filed on behalf of Fortney H. Stark, Jr., *et al.*, on March 2, 1973. See *Fortney H. Stark, Jr., et al. v. George P. Shultz, et al.*, No. 72-1196.

7. Section 202; and see Section 101(2).

8. See, e.g., the statement of the House Committee on Banking and Currency reported at 2 Cong. & Adm. News 1970, 4395-96.

The Secretary of the Treasury subsequently promulgated implementing regulations requiring banks, *et al.*, to:

(1) Secure and maintain a taxpayer identification number for each person or legal entity maintaining an account;

(2) Secure and maintain the social security number of an individual having a financial interest in an account where one or more individuals maintain an account;

(3) Microfilm or copy each document granting signature authority for each deposit or share account;

(4) Microfilm or copy each statement, ledger card, "or other record" showing *each* transaction with respect to the account;

(5) Microfilm or copy each check, clean draft, or a money order drawn on the bank or issued by it, with exceptions under certain circumstances for accounts averaging at least 100 checks per month and which fall into certain specifically enumerated categories, such as dividend, payroll, employee and medical benefit checks;

(6) Microfilm or copy each item other than bank or periodic charges made pursuant to agreement with the customer comprising a debit to the account which is not otherwise specifically required to be kept and which is not specifically exempted; and

(7) Microfilm or copy records prepared or received by a bank in the ordinary course of business which would be needed to reconstruct a checking account and trace a check deposited in the account through its domestic processing system or supply a description of the deposited check.[9]

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9. 31 C.F.R. § 103.34 (1972). Subsequent to commencement of this litigation and the ruling of the District Court, Section 103.34 was amended. The amendments are discussed, *infra*, at 12.

Banks are required to retain the records necessary to reconstruct a checking account for two years. All of the other records described are to be retained for five years.[10]

The Act's recordkeeping requirements are the handmaiden of the Act's automatic reporting provisions. The latter empower the Secretary of the Treasury ("Secretary") to compel reports on transactions involving currency or monetary instruments in whatever amounts the Secretary may specify. (Section 221). The Secretary has implemented this power by requiring reports of currency transactions exceeding $10,000; and by bestowing on himself the power "in his sole discretion" to "make exceptions to or grant exemptions from the requirements of" the Act's automatic reporting provisions. "Such exceptions or exemptions," it is said, "may be conditional or unconditional, may apply to particular persons or classes of persons, and may apply to particular transactions or classes of transactions." (31 C.F.R. § 103.45 (as amended January 17, 1973))

The Bank Secrecy Act directs the Secretary to establish procedures for distributing the information obtained by the Treasury Department "to any other department or agency of the Federal Government" (Section 212), and the Secretary has accordingly offered all information obtained to any "department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired . . . and the official need therefor." (31 C.F.R. § 103.43 (as amended January 17, 1973))

Finally, the recordkeeping and reporting requirements of the Act impose severe civil and criminal penalties.[11]

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10. 31 C.F.R. § 103.36(c) (1972).

11. See Sections 125, 126, 205(b), 206 and 209; and see 31 C.F.R. § 103.47-49. The Secretary is also empowered to seek broad injunctive relief (Section 208), and "may in his discretion remit any forfeiture or penalty . . . in whole or in part upon such terms and conditions as he deems reasonable and just." (Section 234)

This case came to court in June, 1972, with suits by The California Bankers Association and Fortney H. Stark, Jr., *et al.*, to enjoin the operation of the Act and its implementing regulations. The District Court ordered the cases consolidated, convened a three-judge court, and issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions, and persons . . ."[12]

The plaintiffs then joined in a motion for a preliminary injunction. On October 18, 1972, the three-judge court entered an order (1) enjoining enforcement of those provisions of the Act requiring reports of certain domestic currency transactions; but (2) holding constitutional those provisions requiring banks and other financial institutions to maintain certain records, and requiring reports of various foreign financial transactions. The Government has appealed, as have The California Bankers Association and Fortney H. Stark, Jr., *et al.*

Ten days after the District Court issued its order, the Secretary of Treasury announced his intention to amend certain sections of the Act's regulations. (37 Fed. Reg. 23114 (1972)). On January 17, 1973, the Secretary promulgated six (6) amendments We will have occasion to comment on the Secretary's amendments in the discussion following, and simply state here that they illuminate what the District Court called the Act's "peremptory, sweeping, unsafeguarded reporting provisions." (Appendix C, *infra* at 53)

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12. Memorandum of Decision on Application for Temporary Restraining Order, June 30, 1972, *Stark v. Connally*, U.S.D.C., N.D. Cal., No. 72-1045 WTS, and Consolidated Case.

ARGUMENT

1. The Recordkeeping and Automatic Reporting Provisions of the Bank Secrecy Act Are Interdependent. They Must Be Reviewed Together.

The Government has made an effort to separate consideration of the Bank Secrecy Act's automatic reporting requirements from the Act's recordkeeping provisions. The Government's argument in defense of the Act's reporting requirements makes no mention of the fact that recordkeeping is the handmaiden of the Act's reporting requirements. The Act, however, is clear:

> "It is the purpose of this chapter *to require the maintenance of appropriate types of records and the making of appropriate reports* by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." Section 121 (Emphasis added.)

At the same time, the Government implicitly recognizes that the Act's recordkeeping and reporting provisions are mutually dependent. The Government states, for example, that the District Court's order enjoining enforcement of the Act's reporting provisions "creates a serious gap in the Bank Secrecy Act." (J.S., p. 9) This "serious gap" is then explained:

> "These currency transaction *reporting provisions* are necessary to carry out the central objective of the Bank Secrecy Act: to disclose transactions entered into for the purpose of concealing illegal sources of funds while preventing protection of their use in unlawful enterprises. To this end, Title I of the Act is aimed at requiring banks to *maintain records* sufficient to provide the evidence necessary for criminal, tax and regulatory investigations and proceedings, and adequate to make certain that the identity of bank customers is accurately established." (Emphasis added.) (J.S., p. 17)

The extent to which the Act's recordkeeping and reporting provisions are interdependent can be seen in another and more important light.

In *Donaldson v. United States*, 400 U.S. 517 (1971) the Court held that where a taxpayer seeks to intervene to bar production of records "in which the taxpayer had no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer," no absolute right to intervene exists. *Id.* at 523, 530-31.

In *Couch v. United States*, ... U.S. ....., 93 S.Ct. 611 (1973) the Court was confronted with the question of whether a taxpayer could invoke the Fifth Amendment privilege against compulsory self-incrimination "to prevent the production of . . . business and tax records in the possession of [an] accountant," but owned by the taxpayer. *Id.* at 613. The Court rejected the taxpayer's contention that since she "owned" the documents in question, the privilege applied, and held instead that "no Fourth or Fifth Amendment claim can prevail where . . . there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." *Id.* at 619-20.

The rulings in *Donaldson* and *Couch* mock the Government's defense of the Bank Secrecy Act and regulations, and in fact support our contention as appellants that the Act's recordkeeping provisions abrogate Fourth and Fifth Amendment rights.[13] The Bank Secrecy Act and regulations when read with *Donaldson* and *Couch* offer a barren choice, wholly unworthy of a nation committed both to "preserving

13. See *The California Bankers Assn. v. George P. Shultz, et al.*, No. 72-985; and see also *Fortney H. Stark, Jr., et al. v. George P. Shultz, et al.*, No. 72-1196.

inviolate the privilege against compulsory self-incrimination,"[14] and "the right to be let alone."[15]

The Bank Secrecy Act and regulations compel banks and other financial institutions to microfilm and retain virtually every writing or document that passes through the American banking system. If the writing or document originated with the bank (e.g., checking account statement, credit report), the bank's customer will have no absolute right to intervene to resist disclosure. *Donaldson v. United States,* 400 U.S. 517, 530-31 (1971). If the writing or document originated with the bank's customer (e.g., account draft, deposit slip), he may have a right to intervene, but would have to demonstrate "an expectation of privacy" to invoke the Fifth Amendment privilege against self-incrimination. *Couch v. United States, supra* at 619-20. And if, as we believe, an expectation of privacy is inherent in bank-customer relations, then the Act's automatic reporting requirements violate the Fourth and Fifth Amendments. In either case, the Bank Secrecy Act's automatic reporting requirements abrogate and circumvent *whatever* rights may attach to bank-customer relations.

The Bank Secrecy Act and regulations would, at this writing, compel banks and other financial institutions to report, automatically, all domestic currency transactions in-

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14. *Couch v. United States,* ..... U.S. ....., 93 S.Ct. 611, 615 (1973).

15. *Olmstead v. United States,* 277 U.S. 438, 478 (1928). Mr. Justice Brandeis, dissenting with Mr. Justice Holmes in *Olmstead,* called the right to be let alone "the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478.

volving $10,000 or more.[16] If, as we believe, a bank customer expects privacy when he initiates a $10,000 domestic currency transaction, he would seem to be entitled to the protection of the Fourth and Fifth Amendment. But even if we reject an assumption of privacy in bank-customer relations, the Act's automatic reporting provisions are singularly unreasonable. There is simply no certain or even probable connection between a $10,000 domestic currency transaction and the commission of a crime.

In summary, the Bank Secrecy Act compels banks and other financial institutions to record and retain an exhaustive record of their customers' financial lives—a record that includes the identity of the customers' doctors, lawyers, retail and personal creditors, political and social affiliations, avocational interests, vacation plans, mortgage lender, periodical subscriptions, tax payments, haberdasher and shoemaker.[17] To the extent that record is characterized as the bank's property, the bank customer would appear helpless to prevent disclosure. *Donaldson v. United States, supra.* To the extent the information recorded and stored by a bank or other financial institution is owned by the customer, disclosure will depend on whether that information was conveyed in confidence. If so, the customer would appear en-

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16. We use the phrase "at this writing" advisedly. The Act empowers the Treasury Secretary to require reports of currency or monetary instrument transactions in whatever amounts he may specify. (Section 221) The current amount—$10,000—is subject to change or exemption (conditional or unconditional, specific or general) in the Secretary's sole discretion. See 31 C.F.R. 103.22 and 103.45 (1972).

17. "When the Federal Bureau of Investigation first looked into [the Pentagon Papers] case . . . the bureau managed to get Dr. Ellsberg's bank records, including the records of his cancelled checks. From them, the bureau learned the names of all of Dr. Ellsberg's physicians and his two dentists and each of them was interviewed by FBI agents, as were many of his friends and relatives." N.Y. Times, April 30, 1973, at 21, col. 2.

titled to invoke the Fourth and Fifth Amendments. *Couch v. United States, supra.* But in any event, the limitations on disclosure suggested in *Donaldson,* specified in *Couch,* and provided by the Fourth and Fifth Amendments, will become a nullity for bank customers if the Bank Secrecy Act's domestic currency reporting provisions are resurrected by this Court.

Finally, we respectfully direct attention to the bewildering circle that would result if the Bank Secrecy Act's recordkeeping provisions are upheld. Those provisions preclude a citizen from claiming he had an expectation of privacy when dealing with his bank, for he would know—or be presumed to know—that the bank was obliged to maintain a detailed record of their dealings. And since he could not then claim an expectation of privacy, he would, under *Couch,* appear to have no standing to assert his Fourth and Fifth Amendment rights.

This brief is in reply to the Government's jurisdictional statement. But we deem a review of the Bank Secrecy Act's recordkeeping requirements essential to a full and fair consideration of the Act's automatic reporting provisions.

2. The Government's Defense of the Bank Secrecy Act's Reporting Requirements Has No Merit. The Order of the District Court Prohibiting Enforcement Should Be Affirmed.

The Government argues, first, that the District Court ignored the Act's implementing Regulations and judged them "as they might hypothetically be administered." (J.S., p. 10-12). In fact, it is the Government which has ignored the Regulations as they exist, notably 31 C.F.R. § 103.45 (1972). Section 103.45 empowers the Secretary to add, change, alter, or eliminate all of the other Regulations. The extent to which the foregoing authority could be used against particular banks or financial institutions, or against

particular individuals suggests something other than a hypothetical controversy. See *Electric Bond Co. v. Securities and Exchange Commission*, 303 U.S. 419 (1938). In fact, and shortly after the District Court's decision was announced, the Secretary amended 31 C.F.R. § 103.34 to eliminate the requirement that *all* checks, clean drafts or money orders be copied, and instead exempted checks, etc., for less than $100. Appellee has, of course, had no opportunity to demonstrate in a trial forum that the foregoing amendment is meaningless. But the amendment does illustrate the extent to which the Secretary can alter a Regulation in complete disregard of those affected.

The Government argues next that, since the Trading With the Enemy Act requires currency transaction reports, "bank customers cannot claim that they had expected their large currency transactions to remain secret." (J.S., p. 17) In reply, we respectfully note that the Trading With the Enemy Act was enacted while the United States was at war. It was aimed at a specific crime, namely, giving aid and comfort to an enemy of the United States. An "enemy" was one in some manner related to a nation with which the United States was at war. 50 U.S.C. App. § 2. The Trading With the Enemy Act conferred upon the President of the United States wide and pervasive powers in his capacity as Commander in Chief including in certain situations, censorship of communications (50 U.S.C. App. § 3(d)) and regulation of foreign exchange. 50 U.S.C. App. § 5(b). It is doubtful that bank customers buying foreign currency for a vacation abroad in the summer of 1973 would expect to find themselves subject to a wartime measure enacted by a nation deeply embroiled in World War I.

In addition, compliance with the reporting regulations promulgated under Section 5(b) of the Trading With the

Enemy Act, was left to the financial institutions' discretion. No reports were compelled; disclosure was not automatic.

Finally, of course, if the currency transaction reports made by reason of the Trading With the Enemy Act have been of such "great value," (J.S., p. 16) why does the Government now need the Bank Secrecy Act? The answer cannot be, as the Government suggests, "to authorize more definite standards for determining what should constitute the type of unusual transaction that must be reported." (J.S., p. 16) The Act itself empowers the Secretary to require that reports of "[t]ransactions involving any domestic financial institution . . . be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require . . ." (Section 221). The Secretary, in turn, then promulgated a regulation calling for reports of $10,000 domestic currency transactions. 31 C.F.R. § 103.22 (1972). That regulation is subject to complete and unrestricted change. 31 C.F.R. § 103.45. It can be made applicable to a specific bank or individual. *Id.* And it can presumably be used to induce *whatever* related action the Treasury Secretary has in mind. There is nothing definite about the Bank Secrecy Act and its implementing regulation. On the contrary, and among the Act's special failings, is the extent to which it bestows essentially unrestricted power on the principal administrator of a highly regulated and especially sensitive American industry.

CONCLUSION

For the reason stated, that portion of the District Court's order enjoining enforcement of the Bank Secrecy Act's automatic reporting requirements should be affirmed. And the Court should note probable jurisdiction to hear the appeal from that portion of the order denying injunctive relief from the Act's recordkeeping provisions.

Dated: July 11, 1973

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(Appendices Follow)

Appendix A

Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114:

TITLE I—FINANCIAL RECORDKEEPING

Chapter | Sec.
1. Insured Banks and Insured Institutions 101
2. Other Financial Institutions 121

Chapter 1.—INSURED BANKS AND INSURED INSTITUTIONS

Sec.
101. Retention of records by insured banks.
102. Retention of records by insured institutions.

§ 101. Retention of records by insured banks

The Federal Deposit Insurance Act is amended (1) by redesignating sections 21 and 22 as 22 and 23, respectively, and (2) by inserting the following new section immediately after section 20:

"SEC. 21. (a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

"(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

"(b) Where the Secretary of the Treasury (re-

ferred to in this section as the 'Secretary') determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

"(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

"(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

"(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

"(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c).

"(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transac-

tions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

"(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

"(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

"(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law."

§ 102. Retention of records by insured institutions

Title IV of the National Housing Act is amended by adding at the end thereof the following new section:

"SEC. 411. The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in section 21 of the Federal Deposit Insurance Act with respect to insured banks."

Chapter 2.—OTHER FINANCIAL INSTITUTIONS

Sec.
121. Congressional findings and purpose.
122. Authority of Secretary with respect to reports on ownership and control.
123. Authority of Secretary with respect to recordkeeping and procedures.
124. Injunctions.
125. Civil penalties.
126. Criminal penalty.
127. Additional criminal penalty in certain cases.
128. Compliance.
129. Administrative procedure.

§ 121. Congressional findings and purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 122. Authority of Secretary with respect to reports on ownership and control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes

therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

§ 123. Authority of Secretary with respect to record-keeping and procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b), any records or evidence of any type which the Secretary is authorized under section 21 of the Federal Deposit Insurance Act to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

§ 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

§ 125. Civil penalties

(a) For each willfull violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof

who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 126. Criminal penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 127. Additional criminal penalty in certain cases

Whoever willfully violates any regulation under this chapter, section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

§ 129. Administrative procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 5, United States Code shall apply to all proceedings under this chapter, section 21 of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS

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Chapter 1.—GENERAL PROVISIONS

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201. Short title.
202. Purpose.
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204. Regulations.
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206. Exemptions.
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208. Injunctions.
209. Criminal penalty.
210. Additional criminal penalty in certain cases.
211. Immunity of witnesses.
212. Availability of information to other Federal agencies.
213. Administrative procedure.

§ 201. Short title

This title may be cited as the "Currency and Foreign Transactions Reporting Act".

§ 202. Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this title generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to

institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this title or the provision thereof in question.

(j) All reports required under this title and all records of any such reports are specifically exempted from disclosure under section 552 of title 5, United States Code.

(k) For the purposes of section 1001 of title 18, United States Code, the contents of reports required under any provision of this title are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

§ 204. Regulations

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

§ 205. Compliance

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

§ 206. Exemptions

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

§ 207. Civil penalty

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

§ 209. Criminal penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

§ 210. Additional criminal penalty in certain cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

§ 211. Immunity of witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide

other information in a proceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 212. Availability of information to other Federal agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this title to any other department or agency of the Federal Government on the request of the head of such department or agency.

§ 213. Administrative procedure

Subject to section 203(j), the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 4. United States Code, shall apply to all proceedings under this title.

Chapter 2.—DOMESTIC CURRENCY TRANSACTIONS

Sec.
221. Reports of currency transactions required.
222. Persons required to file reports.
223. Reporting procedure.

§ 221. Reports of currency transactions required

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons required to file reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution

which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except htat (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Chapter 3.—REPORTS OF EXPORTS AND IMPORTS OF MONETARY INSTRUMENTS

Sec.
231. Reports required.
232. Forfeiture.
233. Civil liability.
234. Remission by the Secretary.
235. Enforcement authority.

§ 231. Reports required

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any

common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

§ 232. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 231(1) either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

§ 233. Civil liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liabilty under this section shall be reduced by any amount actually forfeited under section 232.

§ 234. Remission by the Secretary

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

§ 235. Enforcement authority

(a) If the Secretary has reason to believe that moneary instruments are in the process of transportation and with respect to which a report required under section 231 has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Sec.
241. Records and reports required.
242. Classifications and requirements.

Chapter 4.—FOREIGN TRANSACTIONS

§ 241. Records and reports required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary

instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

§ 242. Classifications and requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of

the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

* * * * *

Appendix B

31 C.F.R. § 103

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 *Meaning of Terms*

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 *Determination by the Secretary*

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22. *Reports of Currency Transactions*

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemp-

tion contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 *Report of Transportation of Currency or Monetary Instruments*

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to cur-

rency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 *Reports of Foreign Financial Accounts*

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 *Filing of Reports*

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 *Identification Required*

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taypayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 *Determination by the Secretary*

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 *Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts*

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such ac-

count. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 *Records to be Made and Retained by Financial Institutions*

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 *Additional Records to be Made and Retained by Banks*

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim

checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to

reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 *Additional Records to be Made and Retained by Brokers and Dealers in Securities*

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a

domestic financial institution, from any person, account or place outside the United States.

§ 103.36 *Nature of Records and Retention Period*

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 *Person Outside the United States*

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic

account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 *Dollars as Including Foreign Currency*

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 *Photographic or Other Reproductions of Government Obligations*

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 *Availability of Information*

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding

in connection with which the information is sought, and the official need therefor.

§ 103.44 *Disclosure*

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 *Exceptions, Exemptions, Modifications, and Reports*

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 *Enforcement*

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured

savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 *Civil Penalty*

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 *Forfeiture of Currency or Monetary Instruments*

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 *Criminal Penalty*

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 *Enforcement Authority with respect to Transportation of Currency or Monetary Instruments*

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 *Effective Date*

This part shall become effective July 1, 1972.

Appendix C

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United States District Court
Northern District of California

Fortney H. Stark, Jr., et al., *Plaintiffs,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1045
The California Bankers Association, *Plaintiff,* —vs— John B. Connally, Jr., Secretary of the Treasury of the United States, et al., *Defendants.*	No. 72 1157

MEMORANDUM OF DECISION

Before: *HAMLIN,* Circuit Judge, EAST and SWEIGERT, District Judges*

SWEIGERT, J.

Plaintiffs in No. 72 1045 include several named individuals who are bank customers, also the American Civil Liberties Association, suing on behalf of itself as a bank customer and also on behalf of such of its numerous members as are also bank customers; also a bank—the Security National Bank. The only plaintiff in No. 72 1157 is the California Bankers Association, suing on behalf of its membership, which comprises all California banks.

*Judge Hamlin dissents in part.

These plaintiffs seek to enjoin the Secretary of the Treasury from enforcing the provisions of the so-called Bank Secrecy Act, enacted by the Congress on October 26, 1970, to be effective May 1, 1971, and the Regulations issued thereunder on March 31, 1972 (but by their own terms not effective until July 1, 1972) upon the grounds that such enforcement poses grave and irreparable injury to their constitutional rights—their right to freedom from unreasonable search; their constitutional right of privacy; their privilege against self-incrimination; their right to due process as it may affect banks and bank customers, and also the right of private association protected by the First Amendment.

The Bank Secrecy Act (12 U.S.C. Sec. 1829b; 31 U.S.C. Secs. 1051-1122) requires banks and similar financial institutions to keep certain records and authorizes the Secretary of the Treasury to require such institutions and persons participating in transactions with such institutions to report financial transactions to the Secretary for the stated reason (Sec. 1051) that such records and reports have a high degree of usefulness in criminal, tax and other regulatory investigations.

The record-keeping provision of the Act is 12 U.S.C. Sec. 1829b—implemented by Treasury Regulation 31 C.F.R. subpart C, Secs. 103.31-103.37. Section 1829b(b)(c)(d) broadly requires financial institutions to maintain, not only customary ledger card records for commercial and savings accounts, but also to maintain microfilm of all checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection—an authorization which the Secretary has implemented (Regulation 103.31-103.37) with exceptions only for large accounts involving dividend, payroll or employee and medical benefit checks.

The temporary restraining order heretofore issued in this case has not been directed to the record-keeping provisions of the Act, and since we find no constitutional violation in these record-keeping provisions, as such, we reject plaintiffs' contentions insofar as those portions of the Act are concerned.

Turning, however, to the reporting provisions of the Act, those provisions are contained in Title 31 U.S.C. Secs. 1081, 1082, 1083, 1101 and 1121 and have been implemented by Treasury Regulations 31 C.F.R. Part 103, sub-part B, Secs. 103.21-103.26. These reporting provisions fall into two categories: (1) Those relating to *foreign* financial transactions (Secs. 1101 and 1121), and (2) those relating to *domestic* financial transactions (Sec. 1081).

Since, in our opinion, the reporting provisions relating to foreign transactions present no great problem we will first dispose of plaintiffs' challenges to those provisions.

Reporting of Foreign Financial Transactions

31 U.S.C. Sec. 1101 (Reports of Exports and Imports of Monetary Instruments) provides in substance that whoever knowingly transports monetary instruments from the United States or into the United States or receives such at the termination of the transportation to the United States in an amount exceeding $5,000 shall file a report in such form and detail as the Secretary may require setting forth certain specified (sub b) information—with certain qualifications (sub. c) as to common carriers.

Regulation 103.23 (Reports of Transportation of Currency or Monetary Instruments), implementing Section 1101 excepts transfers through normal banking procedures and makes some other exceptions (sub. c).

31 U.S.C. Sec. 1121 (Foreign Transactions) provides in substance that the Secretary of the Treasury, having due regard for the need for controlling export and import of

currency and also due regard to avoidance of unreasonably burdening legitimate transactions with foreign financial agencies, shall by regulation require residents of the United States, who engage in any transactions with a foreign financial agency, to maintain records or file reports, or both, setting forth such of the certain stated information as the Secretary may require. (See also, Sec. 1122).

Regulation 103.24, implementing Section 1121, provides in substance that each person subject to the jurisdiction of the United States, having a financial interest in a bank, securities or other financial account in a foreign country, shall report such relationship as required on his federal income tax return.

We are of the opinion that these portions of the Act, dealing with export and import of monetary instruments and with foreign monetary interests or accounts, do not violate any constitutional provision.

First of all, these is the general rule (which must always be the point of departure in cases calling for judicial review of legislation enacted by the Congress), that the wisdom of legislation and the need for it are matters for the Congress to decide and the Courts should not substitute their judgment for that of the Congress. (See, Justice Stewart dissent in *Griswold v. Connecticut,* 381 U.S. 479 (1965) at 526.) The foregoing reporting provisions of the Act are limited to a narrowly described area of international financial transactions and the Congressional decision falls within the general rule.

The Supreme Court, when dealing with matters of reporting to and surveillance by the executive, has traditionally recognized a distinction between domestic surveillance, on the one hand, and surveillance where foreign nations are involved, pointing out that what might be impermissible in domestic cases may be constitutional where foreign

powers are involved. See, *United States v. United States District Court*, ... U.S. ..... (6/19/72) (slip opinion pp. 10-12; p. 23).

Furthermore, the Act contains procedural protections applicable to its provisions for reporting these foreign transactions. For example, with respect to enforcement of Section 1101, the Act (Section 1105) provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of Section 1121(b) (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law.

We conclude that these provisions violate no constitutional guarantee and that, since these provisions, requiring report of certain foreign financial transactions, are clearly separable from provisions pertaining to the reporting of domestic financial transactions, plaintiffs' motion for a preliminary injunction as to the former is denied.

Reporting of Domestic Financial Transactions

A more formidable problem is presented by the Act's provisions authorizing the Secretary to require reporting to him by financial institutions, and also by persons participating in transactions with them, of domestic financial transactions.

31 U.S.C. Sec. 1081 (Domestic Currency Transaction-Reports) provides that transactions involving any financial institution shall be reported to the Secretary at such time and in such manner, and in such detail, as the Secretary may require, if they involve the payment, receipt or transfer of United States currency or such other monetary in-

struments, as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 1082 provides that the report of any such transaction shall be signed or otherwise made both by the domestic financial institutions involved and by one or more of the other parties thereto or participants therein as the Secretary may require.

Regulation 103.22 (Reports of Currency Transactions), which partially implements these sections, requires financial institutions to report transactions involving currency of more than $10,000.

It will be noted that, although to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction involving any monetary instrument—and in any amount—large or small.

Since, as already noted, the record-keeping provisions of the Act require banks to microfilm all checks, drafts or similar instruments drawn on or presented to or received for deposit or collection by a bank, and since, as noted, the Secretary may require reporting not only by the bank, but also by the other parties to, or participants in, any bank transaction, the required report can include, not only the bank's usual record of its customer's account, but also such information as is disclosed on the face or back of any check, draft or similar monetary instrument—i.e., information concerning the identity of the persons, firms or organizations with whom the drawer has chosen to deal and, further,

such additional "detail" concerning the transactions "as the Secretary may require" from both the bank and other parties or participants.

These reporting provisions of the Act must be considered along with other general provisions, e.g., Section 1053 which vests broad power in the Secretary to prescribe such regulations as he may deem appropriate to carry out the purposes of the Act; also under Section 1055 the Secretary may make and revoke exemptions from the Act's requirements as he may deem appropriate; these exemptions may be conditional or unconditional, by regulation or by order or by licensing, and they may relate to particular transactions or to particular parties. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations.

Further, Section 1061 provides that the Secretary of the Treasury shall, upon such conditions and procedures as he may by regulation prescribe, make any information set forth in the required reports available, for any purpose consistent with the provisions of the Act, to any other federal agency at its request.

The question is whether these provisions, broadly authorizing an executive agency of government to require financial institutions and parties to or participants in transactions with them, to routinely report to it, without previous judicial or administrative summons, subpoena or warrant, the detail of almost every conceivable financial transaction as a surveillance device for the discovery of possible wrongdoing on the part of bank customers, is such an invasion of a citizen's right of privacy as amounts to

an unreasonable search within the meaning of the Fourth Amendment.[1]

That there is such a thing as a constitutionally protected "right of privacy" has been recognized by the Supreme Court in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967) and most recently in *United States v. United States District Court* ..... U.S. ..... (June 19, 1972).[1a]

In *Katz v. United States*, supra, the Supreme Court, holding that government eavesdropping violated the right of privacy upon which a person relied while using an otherwise public telephone booth, said: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See, *Lewis v. United States*, 385 U.S. 206, 210 (1966); *United States v. Lee*, 274 U.S. 559, 563 (1927). But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. See *Rios v. United States*, 364 U.S. 253 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely on the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that

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1. It will be noted that anyone who refuses to so report does so upon peril of criminal prosecution under Section 1058.

1(a). See also, *Doe v. McMillan*, 442 F.2d 879 (D.C.Cir. 1971); *York v. Story*, 324 F.2d 250 (9th Cir. 1963); *Zimmermann v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936). But see, 25 F.Supp. (1938), aff'd in 105 F.2d 583, 586 (1939); *Dietmann v. Time*, 284 F.Supp. 925 (C.D.Cal. 1966); *City of Carmel v. Young*, 2 Cal. 3d 259, 85 Cal. Rptr. 1 (1970); *Brex v. Smith*, 146 Atl. 34 (New Jersey 1969).

the public telephone has come to play in private communication."

Harlan, J., concurring at p. 360-361, concerning what is meant by privacy, added: "My understanding of the rule is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."

In the recent case of *United States v. United States District Court*, ... U.S. ..... (6/19/72) the Supreme Court, considering a presidential claim of legal right to wire tap telephone conversations (without court approval) when deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert its existing form of government, again unanimously held that the Fourth Amendment shields such a conversation from surveillance; that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy; that Fourth Amendment freedoms cannot be properly guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate, especially when resort to appropriate warrant procedure would adequately serve the legitimate purposes of domestic security searches.

In *City of Carmel v. Young, supra,* the California Supreme Court, citing the principle laid down by the Supreme Court of the United States in *Griswold v. Connecticut, supra,* held that a statute requiring public officials and candidates for public office to disclose investments in excess of $10,000, although a laudable and proper legislative concern with possible conflicting interests of public servants, was, nevertheless, an invalid intrusion upon the right of privacy protected by the Fourth Amendment.

Does the constitutional principle laid down by the Supreme Court in the above cases apply in the present case where the government claims legal right to maintain routine surveillance, without summons, subpoena or warrant, over the details of citizens' financial transactions with banks and similar financial institutions for the broadly stated purpose of helping executive agencies of the government to investigate, not only tax and criminal matters, but also other unspecified "regulatory investigations"?

At the outset we must note the holdings in this and other circuits that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963).

It seems, therefore, that bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions.

It will be noted, however, that the cases enunciating this rule all involved situations in which (1) the government agency was seeking only the bank's own records of the

customer's account, and (2) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, e.g., 26 U.S.C. Sec. 7602 et seq., and (3) the government agency was seeking records claimed to be relevant and material to a specific matter then under inquiry, i.e., the correctness of a particular taxpayer's return.

In the operation of the domestic financial transaction reporting provisions of the Act here in question, none of these elements are present.

The power of the Secretary under the Act in question to require reports is not limited to the bank's own records or to information based thereon, e.g., the bank's ledger card record of the state of the customer's account or its own deposit slips or passbook entries. As already indicated, the Act goes much further to authorize the mandatory disclosure of information obtainable from microfilming checks and drafts and also detail information required from the parties to and participants in each transaction.

We do not consider it necessary to pass upon the technical question whether customer's checks, as such, become the property of the bank during the banking process. We do note, however, that banks have traditionally returned, either directly or through the clearing house, all checks each month to the original drawer of the checks. It would seem reasonable therefore, for the drawer of a check to regard himself as the real owner of his checks, subject only to normal banking processing, and to expect that detailed information shown only on the face of his checks will not be automatically broadcast throughout the vast government bureaucracy without at least some notice, summons, subpoena or warrant in connection with some legitimate pending inquiry.

Certainly, at least, a bank customer reasonably expects privacy concerning details of his personal financial affairs

not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transaction.

It would seem that, within these limitations, and within the meaning of *Katz,* supra, a bank customer does expect a degree of privacy in these matters and that such an expectation is one that society has been prepared to recognize as "reasonable."

As stated by the Supreme Court of California in *City of Carmel v. Young,* supra (Burke, J.) (p. 268): "In any event we are satisfied that the protection of one's personal financial affairs and those of his (or her) spouse and children against compulsory disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which government may not intrude absent a showing of compelling need and that the intrusion is not overly broad" . . . "the law must be shown necessary and not merely rationally related to the accomplishment of a permissible state policy. *Griswold v. Connecticut, supra,* 381 U.S. 479, 497. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker, supra,* 362 U.S. 479."

The Act challenged in our pending case makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand.

Sections 7602 et seq., of the Internal Revenue Act of 1954 (26 U.S.C.), already above mentioned, establish procedures whereunder the Secretary of the Treasury, for the limited purpose of ascertaining the correctness of an individual's tax return, may summons the person liable or any person having possession or care of books of account relating to the business of that person or any other person, to appear and to produce such records and to give testimony as may be relevant or material to such inquiry.

Under these procedures the ultimate enforcement of the summons can be judicially controlled when challenged either by the bank or by the customer-taxpayer himself as an intervening third party interest whose financial transactions are involved. *Reisman v. Coplin*, 375 U.S. 440 (1964).[2]

The Act here in question contains no such procedural safeguards with respect to reporting of domestic transactions as are contained in this existing law whereunder the Treasury is already given ample but orderly opportunity to investigate tax violations by citizens.

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2. It is true that in *Donaldson v. United States*, 400 U.S. 517 (1971) the Court limited to some extent the holding of *Reisman* that the customer-taxpayer would have a right to intervene in the summons proceedings, holding that such a right to intervene is not absolute; that for example, there would be no right to intervene when the taxpayer has no proprietary interest in the summoned records (his sole interest being that they presumably contain details of payments to him); that, since he has no other protectible interest by way of privilege or otherwise, he had no absolute right to intervene; that an IRS summons may be issued in connection with a tax investigation if it is issued in good faith and prior to any recommendation for criminal prosecution. But, as pointed out by J. Douglas, concurring (p. 536), a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer, citing *United States v. Kordell*, 397 U.S. 1, 7; and *Reisman v. Coplin*, 385 U.S. 440, 445. Further, legislation is now pending in Congress to modify any effect of *Donaldson* by providing that the government, when acting under IRS statutes, must first get the consent of the bank customer or show cause to obtain bank records concerning the customer.

Further, the Act presents the question whether there is any reasonable relationship between the end sought to be achieved, i.e., possible assistance to the government in its investigations of citizens, on the one hand, and on the other hand, the peremptory, sweeping, unsafeguarded reporting provisions which it authorizes the Secretary to require.

There can be no question about the power of Congress to require records and reports from business entities and citizens (*United States v. Morton Salt*, 338 U.S. 632 (1950)) provided, however, that any such records or reports bear some reasonable relationship to the matters under inquiry. See *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), where the Court held that "a governmental fishing expedition into private papers on the possibility that they may disclose evidence of a crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in the most explicit language" . . . and . . . "access is confined to such documents as are relevant evidence to the inquiry or complaint before the commission. . . ."

In *Shapiro v. United States*, 335 U.S. 1 (1948) at 32-33 the Supreme Court recognized that "There are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record keeper himself," adding, "But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of

particular records subject to inspection by the administrator."

Various tests have been formulated to ascertain the reasonableness of a search and seizure, e.g., a search is unreasonable when "it is out of proportion to the ends sought" (*McMann v. Securities & Exchange Commission*, 874 F.2d 377, 379 (2d Cir. 1937, J. Learned Hand), "balancing the need to search against the invasion which the search entails." *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); "a nexus . . . between the item seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

As compared with the relatively specific and certainly vital national interests involved in *United States v. United States District Court*, supra, i.e., subversion of our form of government, which the Supreme Court has held, nevertheless, insufficient to justify invasion without prior judicial approval, of conversational privacy by wire tap surveillance, the stated reason given in the Act now in question, for invasion of bank customers' reasonable expectation of a degree of privacy, i.e., the mere general possibility that such surveillance will help in criminal, taxation and unspecified governmental investigations, is far more vague and far less convincing.

The same may be said of *City of Carmel v. Young*, supra, wherein the court held that even such an important and specific subject of legislative concern as conflict of interest among public employees was insufficient to justify an overbroad invasion of one's right of privacy in his financial affairs.

How far-fetched is the relationship between the surveillance authorized by this Act and the general expectation that it may uncover wrongdoing is indicated in its legislative history wherein an Assistant Secretary of the Treasury,

testifying before a Congressional Committee stated: "We believe that the imposition of an all-encompassing requirement to photograph all checks drawn on U. S. banks . . . could be impractical, wasteful, and counter-productive. In excess of 20 billion checks are drawn annually in the United States and flow through the banking system and only a small percentage of these are likely to be of use in criminal, tax or regulatory investigations and proceedings." Senate Hearings, p. 178.

Similarly a Commissioner of Internal Revenue testified as follows: ". . . Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem." House Hearings, p. 68.

Remarkably, the government in its brief (7/13/72, p. 5) seems to recognize these considerations by interpreting the reporting provisions of the Act to mean that: ". . . Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, *whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested." (emphasis added).

Of course, if the government intends to obtain the information contemplated by the reporting provisions of the

Act only through use of administrative summons or judicial subpoena, as it has done in the past under existing law, then one may well question the need for this new legislation. However, we must look, not merely to what the government says it intends to do, but to the much broader authorization of the Act itself.

For the reasons above set forth we are of the opinion that the Act in question, insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by The Bill of Rights, particularly the Fourth Amendment provision protecting "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

We therefore, deem it unnecessary to consider plaintiffs' claims based upon the Fifth Amendment privilege against self-incrimination, the Fifth Amendment requirement of due process, and the First Amendment protection of freedom of association.

Plaintiffs' motion in the above consolidated cases for a preliminary injunction is granted to the extent of enjoining defendant from enforcing the reporting provisions of the Act concerning domestic financial transactions—but in no other respect.

This Memorandum constitutes the findings and conclusions of the Court within the meaning of Rules 52 and 65 of Federal Rules of Civil Procedure.

Dated: August 4th, 1972

O. D. Hamlin
Circuit Judge

/s/ William G. East
William G. East
District Judge

/s/ W. T. Sweigert
W. T. Sweigert
District Judge

STARK, et al. v. CONNALLY, et al.—No. 72-1045

CALIFORNIA BANKERS ASSOCIATION v. CONNALLY, et al.—No. 72-1157

HAMLIN, Circuit Judge, dissenting and concurring:

I concur in that portion of the majority opinion in the above case which upholds the constitutionality of 31 U.S.C. §§ 1101, 1121 and 1122, and the Treasury regulations implementing said sections.

I respectfully dissent, however, from that portion of said opinion which holds that 31 U.S.C. §§ 1081, 1082 and 1083 relating to domestic banking transactions are unconstitutional.

As I see it, there is no essential difference between the statutes covering domestic and those covering foreign banking requirements. The majority opinion refers to no authority which is directly on point. The references therein

to cases involving conversational privacy are to me inapposite. Any person or organization using banks for their own purposes does so knowing that the Code sections in question permit access to bank records by the government and reports by the banks concerning those records.

Courts should be slow in finding a Congressional enactment unconstitutional.

In this case, if any hardships result by reason of these statutes, application can be made to Congress for relief.

O. D. HAMLIN

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In the

Supreme Court of the United States

October Term, 1973

No. 72-985

California Bankers Association,

Appellant,

vs.

George P. Shultz, Secretary of the Treasury, et al.,

Appellees.

No. 72-1073

George P. Shultz, Secretary of the Treasury, et al.,

Appellants,

vs.

California Bankers Association,
Fortney H. Stark, Jr., et al.,

Appellees.

No. 72-1196

Fortney H. Stark, Jr., et al.,

Appellants,

vs.

George P. Shultz, Secretary of the Treasury, et al.,

Appellees.

On Appeals from the United States District Court
for the Northern District of California

BRIEF FOR THE APPELLANT

California Bankers Association

INTRODUCTION

In October, 1970, Congress enacted legislation that has come to be known as the Bank Secrecy Act.[1]

The Act has two parts. Title I and its implementing regulations require banks and other financial institutions to copy and retain virtually every piece of paper that passes through the American banking system. Titles II and III require banks among others to report certain domestic and foreign currency transactions.

These cases came to court in June, 1972, with suits by the California Bankers Association (CBA), a number of individuals, a bank, and the American Civil Liberties Union, attacking both the Act's recordkeeping and reporting requirements.

In the fall of 1972, a three-judge court filed a memorandum decision and entered an order (1) denying motions to enjoin the Act's recordkeeping provisions, but (2) granting motions to enjoin the domestic reporting requirements. Both the private litigants and the government have appealed.

This appeal by the California Bankers Association challenges the Bank Secrecy Act's mandatory recordkeeping requirements.

OPINION BELOW

The opinion of the District Court is included in the Single Appendix ("App.") at 75-93, and is reported at *Stark v. Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972).

JURISDICTION

These appeals comprise two consolidated cases seeking to enjoin the recordkeeping and reporting requirements of the Bank Secrecy Act as unconstitutional.

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1. Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114, *et. seq.*, (12 U.S.C. §§ 1829b, 1951-1959, and 31 U.S.C. §§ 1051-1122).

On October 18, 1972, a three-judge court convened pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 968 (28 U.S.C. § 2282), denied motions to enjoin enforcement of the Act's recordkeeping provisions, but granted an injunction enjoining enforcement of the domestic reporting requirements. (App. 94-95).

The government filed a notice of appeal to this Court in both cases on November 13, 1972. (App. 96-99). The CBA and the various plaintiffs in the *Stark* case noticed appeals to this Court on November 16 and 17, 1972, respectively. (App. 100-103).

The California Bankers Association invokes this Court's jurisdiction under Act of June 25, 1948, ch. 646, 62 Stat. 968 28 U.S.C. § 1253. See generally, *Goldstein v. Cox*, 396 U.S. 471 (1970).

QUESTIONS PRESENTED

(1) Do the mandatory recordkeeping requirements of the Bank Secrecy Act bear a reasonable relationship to the Act's objectives as required by the due process clause of the Fifth Amendment?

(2) Does the Bank Secrecy Act violate the limitations this Court has imposed on mandatory recordkeeping by reason of the Fifth Amendment due process clause?

(3) Do the recordkeeping requirements of the Bank Secrecy Act undermine the Fourth and Fifth Amendment limitations this Court has imposed on the government's summons and subpoena power?

(4) Do the recordkeeping requirements of the Bank Secrecy Act invade the privacy inherent in bank-customer relations in violation of the First Amendment?

(5) Are the recordkeeping provisions of the Bank Secrecy Act so inexorably tied to the Act's reporting requirements as to render both unconstitutional for the same reasons?

(6) Does the California Bankers Association have standing to assert the constitutional rights of its members and their customers in this litigation?

STATUTES INVOLVED

Pertinent provisions of the United States Constitution are set forth in *Appendix A* to this brief. The Bank Secrecy Act is set forth in *Appendix B*. The Act's implementing regulations, including amendments, are set forth in *Appendix C*.

STATEMENT

Background—Legislation leading to enactment of the Bank Secrecy Act was first proposed in the spring of 1970 with the introduction of H.R. 15073 in the House of Representatives. Rep. Wright Patman, Chairman of the House Banking and Currency Committee, described the Act as a means of combatting the use of "secret foreign bank accounts and foreign financial institutions as part of illegal schemes by American Citizens and others . . ."[2]

In April, 1970, Senators Proxmire, Brooke, and Williams introduced S. 3678 in the Senate. The latter was similar to H.R. 15073, but contained additional provisions affecting securities transactions with foreign interests.

Hearings on H.R. 15073 and S. 3678 were held in June, 1970. The legislation was actively supported by the Departments of Justice and Defense and by the Securities and Exchange Commission among others. For example, Assistant Attorney General, Will Wilson, speaking for the Department of Justice said:

> "We are deeply concerned when foreign secrecy laws prevent foreign bankers from introducing foreign

2. *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st and 2d Sess., 8 (1970).

bank documents into evidence. We are equally concerned when domestic banks and other domestic financial institutions fail to retain records highly useful to enforcement of the criminal laws—federal, state and local."[3]

In October, 1970, the Bank Secrecy Act, combining and modifying H.R. 15073 and S. 3678, was enacted by the Congress and signed into law by the President. The Treasury Secretary promulgated implementing regulations on March 31, 1972.[4]

The Statutes and Regulations—The Bank Secrecy Act has two parts. Title I has been used to compel banks and other financial institutions to microfilm or otherwise copy virtually every piece of paper that passes through the American banking system. (Sections 101, 102). Title II requires banks and other financial institutions to report certain domestic and foreign currency transactions. (Sections 221, 224).

The Act's reporting requirements are the subject of the government's appeal.[5] This appeal and the appeal in the *Stark* case[6] challenge Title I—the Act's recordkeeping requirements.

Title I provides in part that its purpose is "to require the maintenance of appropriate types of records . . . where such records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101, 121). The Act authorizes regulations compelling banks and

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3. *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess., 58 (1970).

4. See 31 C.F.R. §§ 103.11-103.51, included with this brief as *Appendix C*.

5. See *Shultz v. California Bankers Association*, No. 72-1073.

6. See *Stark v. Shultz*, No. 72-1196.

other financial institutions to (1) identify each person having an account; (2) identify each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any account; (3) identify every person not already identified, for whose account a check, draft, or similar instrument has been received for deposit or collection; and (4) microfilm or otherwise reproduce *all* checks, drafts or similar instruments drawn on or presented for payment or received for deposit or collection. (Section 101). Section 123 imposes similar requirements on uninsured financial institutions, such as those in the business of issuing money orders or travellers checks.

Title I further provides that in addition to the records described above, "each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of" the Act, that is, the maintenance of records that have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101, 102).

Finally, Title I provides that all records or evidence required by the Act "shall be retained for such period as the Secretary may prescribe," not to exceed six years, "unless the Secretary determines, having regard for the purposes of [the recordkeeping requirements], that a longer period is necessary . . . ." (Section 101).

In March, 1972, the Secretary of the Treasury promulgated implementing regulations requiring banks, and others, to:

> (1) Secure and maintain a taxpayer identification number for each person or legal entity maintaining an account;
>
> (2) Secure and maintain the social security number of an individual having a financial interest in an account where one or more individuals maintain an account;

(3) Microfilm or copy each document granting signature authority for each deposit or share account;

(4) Microfilm or copy each statement, ledger card, "or other record" showing each transaction with respect to the account;

(5) Microfilm or copy each check, clean draft, or a money order drawn on the bank or issued by it, with exceptions under certain circumstances for accounts averaging at least 100 checks per month and which fall into certain specifically enumerated categories, such as dividend, payroll, employee and medical benefit checks;

(6) Microfilm or copy each item other than bank or periodic charges made pursuant to agreement with the customer comprising a debit to the account which is not otherwise specifically required to be kept and which is not specifically exempted; and

(7) Microfilm or copy records prepared or received by a bank in the ordinary course of business which would be needed to reconstruct a checking account and trace a check deposited in the account through its domestic processing system or supply a description of the deposited check.[7]

Following the decision by the court below, the foregoing regulation was amended to exclude checks for $100 or less. (38 Fed. Reg. 2174 (1973)) The amendment has no effect on this appeal.

The regulations implementing the Act's recordkeeping provisions also require banks and other financial institutions to maintain extensive records of certain extensions of credit, and transfers of currency, other monetary instruments, checks, investment securities, or credit of more than $10,000, to persons, accounts or places outside the United States. (31 C.F.R. § 103.33).

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7. 31 C.F.R. § 103.34

Finally, banks are required to retain the records necessary to reconstruct a checking account for two years. All of the other required records are to be retained for five years. (31 C.F.R. § 103.36).

Failure to comply with the Act and implementing regulations subjects banks, other financial institutions, and their respective officers, to cumulative civil and criminal penalties. (Sections 125, 126, 127). The Treasury Secretary is also empowered to seek broad injunctive relief. (Section 124).

The Litigation—This litigation began on June 7, 1972, with a suit by a number of individuals, a bank, and the American Civil Liberties Union of Northern California. (*Stark v. Shultz,* No. 72-1196). Two weeks later, the plaintiffs in the *Stark* case were joined in their attack on the Bank Secrecy Act by the California Bankers Association. (*California Bankers Association v. Shultz,* No. 72-985)

The plaintiffs in the *Stark* case are Fortney H. Stark, Jr., a bank president and customer; Security National Bank, an insured national bank; Charles C. Marson, a bank customer; the American Civil Liberties Union of Northern California, a non-profit membership corporation; Fred Lieberman, an individual expecting to export monetary instruments; Edward C. Harwood, Carl Bruer and Edward Durell, individuals maintaining financial interests in and signature authority over one or more bank accounts in foreign countries; and sixteen unidentified additional plaintiffs. The plaintiff in the *California Bankers Association* case is an association comprising all 158 state and national banks doing business in California.

The District Court ordered the two cases consolidated; issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other

financial institutions and persons" (App. 42); and pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 968 (28 U.S.C. § 2282), convened a three-judge court to hear and decide the constitutional issues raised by the complaints and motions for a preliminary injunction.

The District Court Opinion—In a memorandum decision dated September 11, 1972, the District Court upheld the Bank Secrecy Act's recordkeeping and foreign transaction reporting requirements. (App. 75-79). But the District Court found the Act's domestic reporting requirements unconstitutional and, with one judge dissenting, issued a preliminary injunction. (App. 79-93, 94-95).

The District Court did not discuss plaintiffs' objections to the Act's recordkeeping requirements. The decision simply states that the court found "no constitutional violation in these record-keeping provisions, as such." (App. 76-77).

Turning to the Act's reporting requirements, the District Court upheld, first, the provisions compelling reports of exports and imports of monetary instruments. (App. 77-79). The court noted, *inter alia,* that in the case of foreign transactions, the Act contains adequate procedural safeguards:

> "For example, with respect to enforcement of [Section 231] of the Act [Section 235] provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of [Section 241] (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law." (App. 79).

There are, however, no such safeguards in the case of the Act's domestic reporting provisions. The question, then,

in the opinion of the District Court, was whether the broad, unlimited authority of the Treasury Secretary to compel reports on financial transactions from banks, other financial institutions, and their customers without judicial intervention of any kind, "is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment." (App. 81).

The District Court noted, first, this Court's recognition of the right of privacy, and cited among other cases, *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Katz v. United States,* 389 U.S. 347 (1967). (App. 82). The District Court noted also that:

> ". . . communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963)." (App. 84).

In the case of The Bank Secrecy Act, however, the District Court observed that there was no opportunity for judicial supervision or intervention. (App. 85). The Act and its implementing regulations automatically compel reports of certain domestic currency transactions whenever

they occur—or the reporting entity decides they have occurred.[8]

> "The Act challenged . . . makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand." (App. 86-87).

The District Court opinion describes the relationship between the Act's domestic reporting requirements and the crimes sought to be uncovered as "far fetched." (App. 90), and concludes that the Act

> ". . . insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this kind of legislation, as to unreasonably invade the right of privacy protected by the Bill of Rights, particularly the Fourth Amendment provision protecting 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.'" (App. 91).

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8. Determining when a proscribed transaction has occurred is no mean task. Section 103.22 of the regulations is singularly vague. Yet violations of its provisions carry criminal penalties. See 31 C.F.R. § 103.49, and see Section 209 of the Act. The implications of this dilemma will be discussed in our reply to the government's appeal.

The Appeals—The government filed a notice of appeal to this Court on November 13, 1972, seeking review of that portion of the District Court order enjoining the operation and enforcement of the Bank Secrecy Act's domestic reporting requirements. (App. 96-99). On November 16 and 17, 1972, respectively, the California Bankers Association, and the various plaintiffs in the *Stark* case filed notices of appeal from the District Court's refusal to enjoin the operation and enforcement of the Act's recordkeeping provisions. (App. 100-103).

This Court noted probable jurisdiction on October 9, 1973, and the appeals were consolidated for hearing (App. 104).

SUMMARY OF ARGUMENT

(1) The announced purpose of the Bank Secrecy Act is the recording and retention of bank records having "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." The Act and implementing regulations, in alleged pursuit of that purpose, require banks to monitor *every* bank account in the United States, and to copy and retain virtually every piece of paper that passes through the American banking system. As a result, and since the checks one writes reveal the intimate details of a citizen's financial, social and political life, banks are being forced to compile an exhaustive profile on virtually every adult member of the American community.

(2) There is almost no relationship between the Bank Secrecy Act's basic purpose—the detection, apprehension and conviction of criminals—and the requirement that virtually every piece of paper passing through all 200 million American bank accounts be copied and retained. Even if one were to assume that every crime committed in the United States would somehow be revealed by the perpetrator's bank account—including those such as homicide

and forcible rape that have little or nothing to do with banks and banking—*less than 4.4%* of the bank accounts in the United States would be involved. Quite apart, then, from all other objections, the wholesale surveillance of every bank account in the United States is a witless enterprise.

(3) The indiscriminate, mass surveillance of every bank account in the United States is unnecessary and inappropriate. There are any number of alternate, reasonable means available. As such, the Bank Secrecy Act violates due process. See, e.g., *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935) and *N.A.A.C.P. v. Alabama*, 337 U.S. 288 (1964).

(4) The Act violates the Fifth Amendment right of due process by imposing two separate and unreasonable requirements on the American banking industry.

First, the Bank Secrecy Act plainly violates the limitations this Court has imposed on compulsory recordkeeping. There is virtually no relationship between the objectives of the Act and the mass surveillance of every bank account in the United States. The records required have no specific purpose. They have *nothing* to do with the regulation of banks and the banking business. They destroy the Fifth Amendment limitations this Court has imposed on the use of required records against the recordkeeper. See, *Shapiro v. United States*, 335 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968).

Second, the Act violates economic due process by requiring banks to spend approximately $6.1 million each year to make and retain records they do not need or want—$6.1 million a year to spy on their customers.

(5) In *United States v. Powell*, 379 U.S. 48 (1964), *Donaldson v. United States*, 400 U.S. 517 (1970) and *Couch v. United States*, 409 U.S. 322 (1973), this Court set forth

various safeguards against the unlawful use of the government's summons and subpoena power against third-parties. By requiring banks, among others, to record and retain writingss that would otherwise belong to the maker (e.g., checks deposit slips, etc.) the recordkeeping required by the Bank Secrecy Act transfers title and possession to the banks. This destroys the practical and legal ability of a citizen under investigation to assert the Fourth and Fifth Amendment rights outlined in *Powell, Donaldson* and *Couch.*

(6) The privacy and anonymity protected by the First Amendment includes the confidentiality inherent in bank-customer relations. By allowing the Treasury Secretary unlimited discretion to include or exclude banks and bank accounts from its recordkeeping requirements, the Bank Secrecy Act violates the rule that intrusions on First Amendment rights be narrowly drawn, reasonable and definite. See, e.g., *Niemotko v. State of Maryland,* 340 U.S. 268 (1951).

(7) The wording of the Bank Secrecy Act and the government's arguments to this Court confirm that the recordkeeping provisions are the handmaiden of the Act's automatic reporting requirements. Since the reporting requirements plainly violate the First, Fourth and Fifth Amendments, the Act's recordkeeping provisions are unconstitutional for the same reasons.

(8) Finally, since its members are being injured, the California Bankers Association has standing to assert their constitutional rights. (*Sierra Club v. Morton,* 405 U.S. 727 (1972)). In addition, the CBA has standing to assert the constitutional rights of its members' customers. Those rights are fundamental and the banks appear to be the only parties affected by the Act's recordkeeping requirements in a position to assert this constitutional challenge. See, *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

ARGUMENT

Introduction

We have described the Bank Secrecy Act as requiring banks and other financial institutions to microfilm or otherwise copy virtually every piece of paper that passes through the American banking system. To appreciate the impact and effect of that fact, we respectfully call attention, first, to the recordkeeping requirements of the Act and the Treasury Secretary's implementing regulations.

Section 101(b) (relating to insured banks) and Section 123(a) (other financial institutions) provide that where the Secretary "determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations . . ." The Act then requires banks and other financial institutions to maintain "records and other evidence" of the "identity of each person having an account . . . and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account." (Sections 101(c) and 123(a)(1)).

The Act further requires banks, among others, "to the extent that the regulations of the Secretary so require" to microfilm or otherwise copy "each check, draft, or similar instrument drawn on it and presented to it for payment;" and to keep "a record of each check, draft or similar instrument received by it for deposit or collection . . ." (Sections 101(d) (1) and (2)).

> "(f) In addition to or in lieu of the records and evidence otherwise referred to [above], each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section." (Section 101(f)).

Finally, the Act authorizes regulations compelling retention for up to six years, "unless the Secretary determines having regard for the purposes of this section, that a longer period is necessary . . ." (Section 101(g)).

The Treasury Secretary has seized on the foregoing provisions with a vengeance.

Section 103.34 of the Bank Secrecy Act regulations requires banks to

> ". . . secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.
>
> (b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:
>
> (1) Each document granting signature authority over each deposit or share account;
>
> (2) Each statement, ledger card, or other record on each deposit or share account, showing each transaction in, or with respect to, that account;
>
> (3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;
>
> (4) Each item other than bank charges or periodic charges made pursuant to agreement with the cus-

tomer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits." (31 C.F.R. § 103.34).

After this litigation began and the decision of the court below was known, the Secretary amended the foregoing

section.[9] The amendment eliminates the requirement that banks keep microfilm copies of checks "drawn for $100 or less." (31 C.F.R. 103.34(b)(3)(1973)). With all due respect, the $100 exemption is meaningless. A microfilm camera cannot discriminate between checks in different amounts, and there is no practical way for a bank to segregate checks by dollar amounts for copying purposes. Banks are still having to copy every check presented for payment. The 1973 amendment of Section 103.34 does not obviate our objections to the Act and its implementing regulations.

Finally, Sections 103.33 and 103.35 of the regulations impose similar but somewhat narrower requirements on brokers and dealers in securities and other financial institutions. (31 C.F.R. §§ 103.33, 103.35).

1. The Recordkeeping Requirements of The Bank Secrecy Act Subject the American Public to Massive, Indiscriminate Surveillance.

As a result of the Bank Secrecy Act's recordkeeping requirements, banks among others are being forced to compile an exhaustive diary of their customers' financial lives.

The Bank of America—America's largest bank[10]—processes approximately 5,538,000 checks *each day.* (App. 49).

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9. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). In addition to amending Section 103.34, the 1973 amendments provide that information obtained by reason of the Act shall be received by other departments or agencies "in confidence," and etc., (31 C.F.R. § 103.43 (1973)), and "states specifically" (38 Fed. Reg. 2174 (1973)) that "inspection, review or access" to required records "is governed by other applicable law." (31 C.F.R. § 103.51 (1973)). The 1973 amendments also eliminate credit card systems from the operation of the Act (31 C.F.R. § 103.11 (1973)); and delete the phrase "or otherwise modify" from the regulation giving the Secretary authority, "in his sole discretion", to "make exceptions to or grant exemptions from the requirements of" the Act. (31 C.F.R. § 103.45 (1973)).

10. Moody's Bank and Finance Manual 555 (1973).

It is generally accepted that the Bank of America does approximately 40% of the banking business in the State of California. (App. 50). It follows, then, that everyday in California alone, banks must copy and retain the fronts and backs of approximately 13,000,000 checks.

The nationwide effect of the Act's recordkeeping requirements is even more awesome.

> "It is estimated that in 1970 the American banking system will handle over 20 billion checks and that, on the average, each check will be handled by two and a half banks. The requirement, therefore, that every check drawn on a bank be photocopied would mean the production of 20 billion photocopies each year. The recordkeeping requirements that the Secretary may impose could require an additional 30 billion photocopies each year. Looked at another way, this would mean microfilming more than 166 million pounds of little pieces of paper." *Hearings on H.R. 15073 Before the House Committee on Banking and Currency,* 91st Cong., 1st and 2nd Sess., 320 (1970).

More important for our purposes, however, is the fact that these checks provide a social, financial and political profile on virtually every adult member of the American community. A checking account records the identity of the customer's doctors, lawyers, retail and personal creditors, political and social affiliations, educational and avocational interests, vacation plans, mortgage lender, periodical subscriptions, tax payments, haberdasher and shoemaker. A man is defined by the checks he writes.[11]

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11. "When the Federal Bureau of Investigation first looked into [the Pentagon Papers] case . . . the bureau managed to get Dr. Ellsberg's bank records, including the records of his cancelled checks. From them, the bureau learned the names of all of Dr. Ellsberg's physicians and his two dentists and each of them was interviewed by FBI agents, as were many of his friends and relatives." N.Y. Times, April 30, 1973, at 21, col. 2.

There is no rational difference between the recordkeeping requirements of the Bank Secrecy Act and legislation requiring American telephone companies to record and retain all the telephone calls made by all their various subscribers. Such legislation would surely violate the Fourth Amendment right to freedom from "broad and unsuspected governmental incursions into conversational privacy." *United States v. United States District Court,* 407 U.S. 297, 313, (1972). A checking account records a citizen's activities, opinion, and beliefs as fully as the transcripts of his telelphone conversations.[12]

Similarly, there would appear to be no real difference between an Act compelling the banking industry to monitor the financial affairs of its customers and a law requiring retail stores to record their patrons' purchases. Those purchases, after all, could be said to have a "high degree of usefulness in criminal, tax or regulatory investigations or proceedings."

In summary, a citizen's bank records are more than an account of his income and expenditures. They describe the man—his knowledge, opinions and interests—in much the same manner as recordings of his telephone conversations.

2. There Is Virtually No Relationship Between the Bank Secrecy Act's Objectives and Its Recordkeeping Requirements.

The District Court has described the relationship between the Bank Secrecy Act's domestic reporting re-

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12. The government has attempted to distinguish the Bank Secrecy Act from a law compelling telephone companies to record their subscribers' conversations.

> "The telephone company is not a party to a telephone conversation and the disclosure of the conversation to the telephone company and its employees is not necessary in order to facilitate the transmission of the communication." *Motion to Affirm,* filed by the government in Nos. 72-985 and 72-1196, page 13.

In fact, of course, a bank's check and data processing equipment is no more and no less "a party" to a transaction than a telephone company's communications equipment. Their role is the same.

quirements (Title II) and the expectation they may uncover wrongdoing as "far fetched." (App. 90). The foregoing observation applies with equal accuracy to the relationship between the Act's compulsory recordkeeping requirements and the Act's announced purpose, namely, the copying and retention of financial records having "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101 and 121).

To appreciate just how tenuous that relationship is, we respectfully call attention, first, to Sections 101(a)(2) and 123 of the Act, authorizing maintenance and retention of records found by the Secretary to have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." By requiring banks to monitor *every* bank account and to copy and retain virtually every piece of paper that passes through America's domestic banking system, the Secretary has "determine[d]" (31 C.F.R. § 103.31) that *all* the bank records of *every* citizen "have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." That, of course, is nonsense—unless one assumes every citizen is a crook.

Even more unreasonable is the assumed relationship between the mass of material required by the Act and its basic purpose—the apprehension and conviction of criminals.[13]

Statistics are in order.

First, the data available indicates that as of June 30, 1972, there were 200,700,515 bank accounts in the United States.[14]

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13. See, *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess., 1-2 (1970).

14. Federal Deposit Insurance Corporation, Summary of Accounts and Deposits In All Commercial Banks—June 30, 1972 (National Summary), 18 (1972).

Second, and to use an example of a crime deemed rampant, the Federal Bureau of Investigation estimates that in 1972, there were 527,400 arrests for violation of State and Federal drug abuse laws.[15]

It follows, then, that even if we assumed that *all* narcotics law violations would, in some way, be indicated by the offenders' bank records *less than .03%* of the bank accounts in the United States would disclose evidence of drug abuse, and then only *some* of the records in those accounts would be useful. Even if one *triples* the number of estimated arrests for narcotics law violations, on the assumption the Bank Secrecy Act would reveal otherwise undetected crimes, less than .09% of the 200,700,515 bank accounts in the United States would be involved.

Consider, next, that there were an estimated 78,600 arrests for illegal gambling in the United States in 1972.[16] Illegal gambling, more so than most crimes, presumably involves the use of banks and bank accounts. Yet here again, even if we multiply the number of arrests by a factor of ten (10), again on the assumption the Act would result in increased detection, *less than .04%* of the bank accounts in the United States would be involved.

Finally, even if we take the total number of estimated arrests in 1972 for *all* crimes in the United States (8,712,400),[17] including those such as homicide, arson and forcible rape that have little or nothing to do with banks and bank accounts, the records relating to *less than 4.4%* of the 200 million American bank accounts would be useful.

There is, then, a gross disparity between the objectives of the Act and its recordkeeping requirements. Quite apart

15. Federal Bureau of Investigation, Uniform Crime Reports for the United States, 119 (1972).

16. *Id.*

17. *Id.*

from all other objections, the wholesale surveillance of every bank account in the United States is a witless enterprise.

3. Since There Is No Rational Relationship Between the Objectives of the Act and the Recordkeeping It Requires, the Bank Secrecy Act Violates Due Process.

The discrepancy between means and ends inherent in the wholesale surveillance of every bank account in the United States would appear to be in clear violation of the due process principles announced in such cases as *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935) and *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964).

In *Helvering*, the constitutionality of an Internal Revenue Service regulation requiring inclusion of the value of a revocable trust in the estate of the decedent trustor was in question. *Id.* at 86. The taxpayer argued, *inter alia*, that inclusion would be arbitrary and deprive the taxpayer of property without due process. *Id.* at 89. The Court rejected that contention and said:

> "The test of validity in respect of due process of law is whether the means adopted are appropriate to the end . . . if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights . . . the guarantee of due process is infringed." *Id.* at 90.

The Court reasoned that inclusion of the revocable trust corpus in the taxable estate was essential to prevent tax evasion. *Id.* at 91. The Court concluded, however, that there are "limits to the power of Congress to create a fictitious status under the guise of supposed necessity," and cited two examples of tax regulations that were "so grossly unreasonable as to violate the due process clause of the Fifth Amendment." *Id.* at 92. See also, *Heiner v. Donnan*, 285 U.S. 312

(1932) and *Hooper v. Tax Commissioner of Wisconsin*, 284 U.S. 206 (1931).

Here, the gross disparity between the objectives of the Bank Secrecy Act and the means employed are clear. Every bank account in the United States simply does *not* have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings."

In *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964) this Court found Alabama's attempts to prohibit the N.A.A.C.P. from doing business in that State a violation of due process. Writing for a unanimous Court, Mr. Justice Harlan said in part:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms . . ." *Id.* at 307.[18]

Conceding the government's desire to know, we reject the contention it has a right to know everything. There might well be a "high degree of usefulness" in having every citizen keep a log of his comings and goings, or requiring every citizen to carry a radio transmitter fixing his location. While both requirements would assist in the apprehension of criminals, they would offend even the least sophisticated notions of freedom and privacy.

Finally, the objectives of the Bank Secrecy Act could be met by any number of alternate means. These might include a requirement that individuals retain certain bank records; that recordkeeping be limited to certain defined types of accounts; or that it be limited to certain defined trans-

18. Accord: *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); and *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

actions. There are numerous alternatives to the gluttonous surveillance of all 200 million American bank accounts. Even assuming the government's interest is legitimate and substantial, it "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960)

4. The Bank Secrecy Act's Recordkeeping Requirements Impose an Unreasonable Burden, in Violation of the Fifth Amendment Right of Due Process.

The burden imposed on banks, among others, by the recordkeeping requirements of the Bank Secrecy Act is unreasonable for at least two separate reasons.

Limitations on Recordkeeping—First, the Act violates the limitations this Court has imposed on compulsory recordkeeping.

Congress may, of course, require private citizens and business entities to keep records and make reports. See, e.g., *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950). But that authority has always been limited by the provisio that the records and reports bear some reasonable relationship to the matter under inquiry. *Id.* at 652. Here, as we have said, the relationship between the objectives of the Act and the wholesale surveillance of every bank account in the United States is, at best, tenuous. This disparity, alone, is unreasonable.

Second, there is the requirement that the records be reasonably related to a specific purpose. See, e.g., *United States v. Morton Salt Co.,* 338 U.S. 632, 651 (1950); *Shapiro v. United States,* 335 U.S. 1, 32 (1948); *Yakus v. United States,* 321 U.S. 414, 424 (1944); and *United States v. Darby,* 312 U.S. 100, 125 (1941). In the *Morton Salt* case, for example, the required recordkeeping was in aid of a cease and desist order issued by the Federal Trade

Commission. In the *Shapiro* and *Yakus* cases, the required records were essential to the enforcement of a wartime price control act. The recordkeeping approved in *U.S. v. Darby, supra,* was required in the enforcement of a Federal wages and hours law, and in language common in these cases, the Court said that since Congress could prescribe certain wages and hours, "it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records . . . is an appropriate means to the legitimate end." *Id.* at 125. In this case, the recordkeeping required by the Bank Secrecy Act has no specific purpose other than the accumulation of data "having a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." It does not aid in the enforcement or supervision of any particular legislation and is the means to no apparent end.

Third, this Court—and indeed Congress—has until now consistently confined compulsory recordkeeping to that required to monitor either (1) the recordkeeper, or (2) the recordkeeper's business. Legislation requiring gamblers to record income or employees to record wages and hours, for example, is aimed primarily at the recordkeeper. See, e.g., and respectively, *Marchetti v. United States,* 390 U.S. 39 (1968) and *United States v. Darby,* 312 U.S. 100 (1941). Legislation requiring firearms dealers or drug manufacturers to maintain sales records is designed to monitor the marketing of their respective wares. See, e.g., and respectively, 18 U.S.C. § 923(g) and 21 U.S.C. § 827(b). The latter are directed at both the recordkeeper and the buyer. See generally, *United States v. Miller,* 426 F.2d 794 (4th Cir. 1970). Here, the recordkeeping required by the Bank Secrecy Act has *nothing* to do with the regulation of banks or other financial institutions. America's banks are regulated, among other provisions, by the Federal Reserve Act and

the Federal Deposit Insurance Act.[19] There is no suggestion in the Act's legislative history, and there can be no suggestion in this litigation, that the Bank Secrecy Act is required or even involved in the regulation of America's financial industry. The Bank Secrecy Act is aimed instead at that industry's customers.

Fourth, and finally, the three qualifications on the use of required records in a criminal action against the recordkeeper set forth in *Shapiro v. United States,* 335 U.S. 1 (1948); *Marchetti v. United States,* 390 U.S. 39 (1968); and *Grosso v. United States,* 390 U.S. 62 (1968) would seem especially applicable here.

It is said, first, that records must be ones that the defendant would "customarily" keep. Second, they must have some specific "public aspect"; and third, they must have arisen out of an "essentially non-criminal and regulatory area of inquiry." *Marchetti v. United States,* 390 U.S. 39, 57 (1973)[20] In other words, the government cannot use required records against the recordkeeper in a criminal prosecution unless they would (1) ordinarily be kept in any event; (2) serve some specific public as opposed to private, purpose; and (3) arise in a civil context. The foregoing limitations are designed, of course, to protect the defendant from compulsory self-incrimination. But that protection is destroyed when, as in the case of the Bank Secrecy Act, the recordkeeping obligation is shifted to a third-party, namely banks or other financial institutions, where the privilege against self-incrimination would not apply. See *Couch v. United States,* 409 U.S. 322, 334-335 (1973). Con-

19. See, Federal Reserve Act, Act of December 23, 1913, ch.6, 38 Stat. 251, (12 U.S.C. § 221, *et seq.*); and see Federal Deposit Insurance Act, Act of September 21, 1950, ch. 967, 64 Stat. 873, (12 U.S.C. § 1811, *et seq.*).

20. See, McKay, *Self-Incrimination and the New Privacy,* 1967 Sup. Ct. Rev. 193, 214-217; and Note, *Required Information and the Privilege Against Self-Incrimination,* 65 Colum. L. Rev. 681 (1965).

versely, if the foregoing limitations *are* deemed applicable to a third-party recordkeeper (e.g., banks), then the records required by the Act violate this Court's "required records" doctrine. They are *not* "customarily" kept by banks;[21] they have an all-purpose, rather than specific "public aspect"; and, at best, arise out of *both* a criminal and civil context.

In summary, the Bank Secrecy Act circumvents the limitations this Court has imposed on required recordkeeping. As a result, banks among others are having to keep records for no specific purpose other than the indiscriminate surveillance of the American public. That surveillance, in turn, undermines the limitations on the use of required records in a criminal action against the recordkeeper.

Costs—Quite apart from circumventing limits on compulsory recordkeeping, the Bank Secrecy Act imposes an onerous and unreasonable financial burden—unreasonable because it has no specifice purpose, and onerous because it is costing the recordkeepers a lot of money.

That latter fact is not in dispute.

An uncontested affidavit filed in the District Court establishes that in the first year alone, the Act's recordkeeping requirements cost the Bank of America $392,631.84. (App. 25) Since the Bank of America appears to hold roughly 6.4% of the sums on deposit in America's banks,[22] we may fairly assume that compliance with the Bank Secrecy Act's recordkeeping requirements is currently costing the American banking industry approximately $6.1 million

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21. See discussion, *infra*, at 29.

22. The Federal Deposit Insurance Corporation reports that as of June 30, 1972, there was $553,516,000,000 on deposit in America's banks. (Federal Deposit Insurance Corporation, Summary of Accounts and Deposits In All Commercial Banks—June 30, 1972 (National Summary), 12 (1972)). As of December 31, 1972, the Bank of America held deposits of $35,428,165,000, or approximately 6.4% of the total. (See, American Banker, February 13, 1973, at 105, col. 1.)

a year. The foregoing does not include the additional cost to savings and loan associations, brokers or dealers in securities and other financial institutions. The plain fact is simply this: America's banks, among others, are being forced to spend in excess of $6.1 million a year to spy on their customers.

The government has suggested that most of the records required by the Act are copied and retained in any event.[23] In fact, the Treasury Secretary has admitted that the Act requires "[i]ncreased recordkeeping on the part of banks and other financial institutions of both domestic and foreign related items."[24] In addition, and in the cases now before this Court, the uncontested fact is that but for the Bank Secrecy Act, the Bank of America, for example, would *not* be required to keep "a record of the taxpaper identification number or a record of the Social Security number of its depositors"; would *not* be required to retain copies of "each check, clear draft or money order drawn on the bank;" and would *not* be required to copy the front and back of each check cleared by the bank. (App. 48). Finally, one of the main reasons the Department of Justice proposed and promoted the Bank Secrecy Act was to obtain records not otherwise available.[25]

5. The Bank Secrecy Act's Recordkeeping Requirements Undermine the Safeguards Against Unlawful, Unreasonable and Indiscriminate Use of the Government's Summons and Subpoena Power.

The adverse effect of the Bank Secrecy Act's record-keeping requirements on Fourth and Fifth Amendment

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23. *Motion to Affirm*, filed by the government in Nos. 72-985 and 72-1196, at p.8, n.7.

24. Annual Report of the Secretary of the Treasury on the State of the Finances, 287 (1972).

25. *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess., 58 (1970).

rights may well be illustrated in a number of ways. But nowhere is the damage more apparent than that to the safeguards against improper use of the government's summons and subpoena power.

Consider, for example, the use and enforcement of administrative summonses issued by the Internal Revenue Service.[26] If the summons is directed to the taxpaper and he refuses to comply, certain standards must be met before the District Court can order enforcement. Writing for the majority in *United States v. Powell,* 379 U.S. 48 (1964), Mr. Justice Harlan ruled that while the Commissioner of Internal Revenue need not show probable cause, he must demonstrate

> "that the investigation will be conducted pursuant to a legitimate purpose that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.[27]

In the case of an IRS summons directed to a third party, a different issue has emerged, namely, whether and when the taxpayer may intervene. In *Reisman v. Caplin,* 375 U.S. 440 (1964) the Court appeared to hold that the taxpaper could, without more, intervene and challenge the summons on any appropriate ground. *Id.* at 449.

The *Reisman* ruling apparently hampered IRS tax investigation,[28] and in *Donaldson v. United States,* 400 U.S. 517

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26. See Act of August 16, 1964, c. 736, 68A Stat. 901 (26 U.S.C. § 7602).

27. The *Powell* case involved a summons directed to the president of a corporate taxpayer, and in a companion case involving an individual taxpayer, this Court set forth the same enforcement standards. See *Ryan v. United States,* 379 U.S. 61 (1964).

28. Ord, *The IRS's Right of Access to the CPA's Workpapers and Client Records,* The Tax Advisor 516, 517 (September 1973). The author was formerly Assistant U.S. Attorney for the Northern District of California, Civil Tax Litigation and Criminal Tax Prosecutions; and a trial attorney in the Tax Division of the Department of Justice. *Id.* at 516.

(1970) the taxpayers right to intervene was limited. In *Donaldson*, the IRS directed a summons to the taxpayer's accountant and former employer. The summons called for various writings and documents pertaining to the taxpayer but owned by the respondents. The IRS initiated enforcement proceedings, and the taxpayer attempted to intervene. This Court denied intervention, and said the taxpayer did not have a "significantly protectable interest." *Id.* at 531. The latter appears to include actual or constructive possession of the records in question; an attorney's or accountant's work product; or an "established attorney-client or other privilege." *Id.* at 530. In addition, *Reisman* suggests, supported by dicta in *Donaldson*, that a taxpayer has a right to intervene if the IRS has recommended criminal prosecution prior to issuance of the summons. See *Reisman v. Caplan, supra,* and see *Donaldson v. United States, supra* at 536.

Finally, in 1973, this Court came to consider whether an IRS summons, directing a third-party accountant to produce papers given him by a taxpayer, could be enforced over the taxpayer's assertion of the privilege against self-incrimination. In *Couch v. United States,* 409 U.S. 322 (1973), the Court held that since the Fifth Amendment prohibition against compulsory self-incrimination was personal in nature, and since the taxpayer had surrendered possession of the papers in question, his ownership was irrelevant and the IRS summons would be enforced. Here again, however, the Court set forth two qualifications. First, the Court recognized that there may be situations "where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Id.* at 333. In the foregoing situation, the privilege against self-incrimination could well be applicable. *Id.* Sec-

ond, the Court suggested that when a taxpayer delivers records to a third party with a legitimate "expectation of protected privacy or confidentiality," he may be in a position to assert Fourth and Fifth Amendment protection. *Id.* at 335-336.

Together, *Powell, Reisman, Donaldson* and *Couch* would seem to set forth the standards and exceptions applicable to enforcement of an IRS summons. The recordkeeping requirements of the Bank Secrecy Act however, undermine those standards and eliminate whatever opportunity a taxpayer might have to contest disclosure. By compelling banks, among others, to copy a taxpayer's checks, deposit slips, and etc., the Act effectively transfers title and possession from the taxpayer to the bank without regard to the parties' intentions, plans or purpose. Copies made by a bank belong to that bank. For all practical purposes the copies are the equivalent of the originals. As such, the Act's compulsory recordkeeping requirements convert virtually every piece of paper that passes through the American banking system into the personal and possessory property of the banks. The Act abrogates banks' historical and customary role as temporary custodians of their customers' written orders and instructions, and instead gives them title and possession to a glut of documents they do not need or want.

As a result of this compulsory change in ownership and possession, the IRS, for example, will seldom find it necessary to direct a summons to a taxpayer under investigation. The taxpayer's bank and the other financial institutions with whom he deals will, by reason of the Bank Secrecy Act, have in their possession a detailed chronicle of the taxpayer's financial affairs. More importantly, the taxpayer's opportunity and ability to resist disclosure will, for all practical purposes, be destroyed. Assuming he

learns of the summons—by no means certain[29]—his ability to challenge disclosure would depend, first, on his right to intervene, that is, whether he has a "significantly protectable interest." *Donaldson v. United States, supra,* at 531. As we have noted above, the latter is said to include actual or constructive possession, an attorney or accountant work product, or an evidentiary privilege. *Id.* at 530. Yet *none* of the foregoing applies to copies made and retained by banks in accord with the Bank Secrecy Act.

Nor could the taxpayer claim an "expectation of protected privacy or confidentiality." *Couch v. United States, supra,* at 335-336. The Act's *mandatory* copying requirements preclude any "expectation of protected privacy." Privacy and confidentiality are inconsistent with a statute that compels banks and other financial institutions to make and retain copies of their customers' papers for the use of the government "in criminal, tax or regulatory investigations or proceedings."

Intervention by the taxpayer, then, would appear to depend on the IRS having recommended criminal prosecution. See *Reisman v. Caplin, supra,* and see *Donaldson v. United States, supra,* at 536. But assuming criminal action had been recommended and the taxpayer allowed to intervene, what constitutional rights could he assert? The Bank Secrecy Act's mandatory copying requirements give the financial institutions with whom the taxpayer deals title to

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29. A recent study conducted by the American Civil Liberties Union shows that while the majority of the nation's largest banks support the confidentiality of bank records, this policy may not be enforced on a day-to-day basis at the local level.

> "[M]any banks voluntarily allow agents of the government—police, FBI agents, investigators for Congressional committees—to examine at will the records of individual and organizational accounts, without the permission or indeed the knowledge of any of the people involved." American Banker, May 19, 1972, p.1, cols. 3-4.

and possession of his records. As such, he could not assert the Fifth Amendment privilege against compulsory self-incrimination. *Couch v. United States,* 409 U.S. 322, 334-335 (1973); *Johnson v. United States,* 228 U.S. 457 (1913). Nor could he assert Fourth Amendment protection from unreasonable search and seizure. Having recommended criminal prosecution for income tax evasion, as an example, the government would clearly have probable cause for a summons directed to the taxpayer's bank. See *United States v. Powell,* 379 U.S. 48, 57 (1964); and see also *First National Bank v. United States,* 295 F. 142 (S.D. Ala. 1924) *aff'd per curiam,* 267 U.S. 576 (1925).

In summary, the safeguards established by this Court to prevent illegal and improper use of the government's summons and subpoena power have been virtually destroyed by the Bank Secrecy Act. By undermining *Powell, Donaldson,* and *Couch,* the Act impairs the balance this Court has established between the government's need to know and the citizenry's right to financial privacy. Quite apart from the gross overreaching inherent in the surveillance of every bank account in the United States, the Bank Secrecy Act eliminates effective challenge to an IRS third-party summons.

6. The Bank Secrecy Act's Recordkeeping Requirements Violate the First Amendment Rights of Privacy and Anonymity.

The relationship between a bank and its customers has been variously described as that of debtor and creditor[30] or agent and principal.[31] Most of the cases use language similar to that in an old New York case, *Crawford v. West Side Bank,* 100 N.Y. 50, 2 N.E. 881 (1885):

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30. 9 C.J.S. *Banks and Banking* § 267(c), 546.

31. *Crawford v. West Side Bank,* 100 N.Y. 50, 2 N.E. 881 (1885); *Dalmatinsko, etc. v. First Union Trust and Savings Bank,* 268 Ill. App. 314 (1932); *Bernhard v. Bank of America, N.T. & S.A.,* 19 C.2d 807, 122 P.2d 892 (1942).

> "The relation existing between a bank and its depositors is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor the bank must do so subject to the rules obtaining between principal and agent." *Id.*

Both definitions recognize that the relationship is contractual, and that among the elements of that contract, none is more important than the banks' express and implied assurance of privacy. This assurance of privacy has been consistently recognized by the American courts. See *Zimmermann v. Wilson,* 81 F.2d 847 (3d Cir. 1936); *United States v. First Nat. Bank of Mobile,* 67 F. Supp. 616 (S.D. Ala. 1946) *Peterson v. Idaho First Nat. Bank,* 83 Ida. 578, 367 P.2d 284 (1961). In the *Peterson* case, for example, the court said:

> "It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors . . . . It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract." *Peterson v. Idaho First Nat. Bank, supra,* at 290.[32]

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32. "Secrecy has been a basic tenet of banking ever since its establishment. Specific rules date back to the seventeenth century; and with rare exception bank secrecy has never been totally banned in any country. It has survived both commercial and political crises; only in wartime or under dictatorships has it been abused or abolished." Schuster and Lehner, *Why Swiss Bank Secrecy,* 156 The Bankers Magazine 32 (Autumn, 1973). The authors are officers of the Institut fur Bankwirtschaft in St. Gallen, Switzerland.

By reason of this assurance of privacy, the American public has come to regard confidentiality in bank-customer relations as an aspect of their personal privacy.

The First Amendment protects personal privacy. See, e.g., *Katz v. United States,* 389 U.S. 347 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1965); and *Rios v. United States,* 364 U.S. 253 (1960). And in the case of the First Amendment, this Court has been especially sensitive to improper government intrusion. For example, statutes and ordinances requiring permits from local officials as a prerequisite to the use of public places have been held invalid in the absence of narrowly drawn, reasonable and definite standards. *Niemotko v. State of Maryland,* 340 U.S. 268, 271 (1951).

Here, the Act authorizes and allows the Treasury Secretary to find that any and all bank records originating with a bank or its customers have "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (Sections 101, 123). The Secretary has seized on the foregoing provisions and declared that virtually *every* piece of paper that passes through America's domestic banking system has "a high degree of usefulness in criminal, tax or regulatory investigations or proceedings." (31 C.F.R. §§ 103.31, 103.34).

The Act is too broad. It provides no definite standards. If "high degree of usefulness in criminal, tax or regulatory investigations or proceedings" is an acceptable standard, what is to prevent the Congress from declaring that all telephone conversations, retail purchases, and letters sent and received "a high degree of usefulness" in criminal investigations?

Quite apart from its vague, ill-defined standards for inclusion, the Act's recordkeeping requirements impair pri-

vacy by allowing the Treasury Secretary virtually unlimited discretion in granting exemptions from those requirements. (Section 101(c). This absence of standards for inclusion or exclusion gives the Treasury Secretary free rein to intrude on the First Amendment. The Secretary can include and exclude individual banks, bank accounts and customers at will. Political and financial abuse is possible. Intrusion on the First Amendment is near certain.

Finally, the Act's recordkeeping requirements impair a corollary to the First Amendment right of free expression —the right to remain anonymous. Those engaged in the dissemination of ideas need not be publicly identified. *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960); *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462 (1958). It is said that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley v. State of California,* 362 U.S. 60, 65 (1960). The copying and retention of every check made by every bank customer cannot help but impair the free exercise of such First Amendment rights as political association, personal expression and religious affiliation. Anonymous donations may well be essential to the survival of public-interest or controversial organizations. (App. 33-34). Anonymity surely disappears when, at the direction of the government, an intermediary is required to monitor, record and retain the act of affiliation or expression.

7. Since the Bank Secrecy Act's Recordkeeping and Domestic Reporting Requirements Are Inexorably Tied, They Are Unconstitutional for the Same Reasons.

The Bank Secrecy Act's recordkeeping requirements are the handmaiden of the Act's domestic reporting provisions. The bank records required by the Act supplement the

compulsory reports called for under Title II. Section 121(b), for example, provides:

> "It is the purpose of this chapter *to require the maintenance of appropriate types of records and the making of appropriate reports* . . . where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." (Emphasis added).

The government appears to concede that the recordkeeping and reporting provisions are mutually dependent. The government has said that the District Court's order enjoining enforcement of the Act's reporting provisions "creates a serious gap in the Bank Secrecy Act."[33] This "serious gap" is then explained:

> "These currency transaction *reporting provisions* are necessary to carry out the central objective of the Bank Secrecy Act: to disclose transactions entered into for the purpose of concealing illegal sources of funds or preventing protection of their use in unlawful enterprises. To this end, Title I of the Act is aimed at requiring banks to *maintain records* sufficient to provide the evidence necessary for criminal, tax and regulatory investigations and proceedings, and adequate to make certain that the identity of bank customers is accurately established." (Emphasis added).[34]

For the reasons given by the District Court (App. 79-92), and for the reasons to be set forth by the CBA in reply to the government's appeal, the Act's domestic reporting requirements are unconstitutional. As the handmaiden of

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33. *Jurisdictional Statement*, filed by the government in Nos. 72-985 and 72-1196, page 9.

34. *Id.* at 17.

those provisions, the Act's recordkeeping requirements are invalid for the same reasons.

8. The California Bankers Association Has Standing to Assert the Constitutional Rights of Its Members and Their Customers.

The government has argued that the California Bankers Association has no standing to assert the constitutional rights of its members' customers.[35] The government's argument would appear to ignore applicable law.

First, "an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). The critical question is said to be whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. . ." *Baker v. Carr,* 369 U.S. 186, 204 (1962). Here, the injury to the member banks of the California Bankers Association is evident and substantial. The Bank Secrecy Act asks banks to record and retain—at substantial cost—the details of their customers' financial, social and political lives in apparent violation of their's and their customers' rights under the First and Fifth Amendments.[36]

Second, it seems clear that the CBA has standing to assert the constitutional rights of its members' customers. Beginning at least with *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), this Court has upheld the right of representative litigants to assert the constitutional rights of those they represent. In the *Society of Sisters* case the Court found a statute unconstitutional because it ". . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of chil-

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35. See, e.g., *Motion to Affirm,* filed by the government in Nos. 72-985 and 72-1196, pages 9 and 23.

36. See discussion, *supra,* at 23-38.

dren under their control." *Id.* at 534-535. The plaintiff in the case was a private parochial school, and neither the parents, guardians nor children subject to the statute were parties to the litigation. Here, as in the *Society of Sisters* case, the banks ask "protection against arbitrary, unreasonable and unlawful interference with their patrons." *Id.* at 536.

The *Society of Sisters* case was analyzed and approved in *Barrows v. Jackson,* 346 U.S. 249 (1953), the Court noting:

> ". . .[W]e believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect fundamental rights which would be denied by permitting the damages action to be maintained." *Id.* at 257.[37]

More recently, in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the Court upheld the standing of a contraceptive distributor to assert the rights of unmarried persons denied access to birth control devices. The Court noted that since the statute in question did not subject unmarried persons to prosecution, "to that extent [they] are denied a forum in which to assert their own rights." *Id.* at 446. Similarly, and in the case now before this Court, the banks' customers are not subject to prosecution. The Act's recordkeeping burden and criminal sanctions fall on banks and other financial institutions. (Sections 101(d) and 123(a) 126, 127). Their customers are not subject to prosecution. Yet it is their customers whose rights of due process and privacy are being violated.

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37. See generally, Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962). Professor Sedler's analysis was cited with approval in *Eisenstadt v. Baird,* 405 U.S. 438, 445 (1972).

CONCLUSION

For the reasons stated, it is respectfully submitted that that the order of the District Court denying the motion of the California Bankers Association for a preliminary injunction, restraining the enforcement and operation of Title I and implementing regulations of the Bank Secrecy Act, should be reversed.

November 16, 1973

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(Appendices Follow)

Appendix A

The Constitution of the United States of America

Amendments

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114

TITLE I—FINANCIAL RECORDKEEPING

Chapter 1.
Insured Banks and Insured Institutions

§ 101. Retention of Records by Insured Banks—Congressional Findings and Declaration of Purpose

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness

in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank

shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

§ 102. Retention of Records by Insured Institution

The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in Section 21 of the Federal Deposit Insurance Act with respect to insured banks."

Chapter 2.
Other Financial Institutions

§ 121. Congressional Findings and Declaration of Purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 122. Reports on Ownership and Control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

§ 123. Recordkeeping and Procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degre of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) any records or evidence of any type which the Secretary is authorized under section 21b of the Federal

Deposit Insurance Act to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

§ 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or

temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

§ 125. Civil Penalties

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 126. Criminal Penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 127. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any regulation under this chapter, section 21b of the Federal Deposit Insurance Act, or section 411 of the National Housing Act where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

§ 129. Administrative Procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 21b of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS

Chapter 1.
General Provisions

§ 201. Short Title

This title may be cited as the "Currency and Foreign Transactions Reporting Act".

§ 202. Congressional Declaration of Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and Rules of Construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;
(14) a dealer in precious metals, stones, or jewels;
(15) a pawnbroker;
(16) a loan or finance company;
(17) a travel agency;
(18) a licensed transmitter of funds;
(19) a telegraph company;
(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or
(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

(k) For the purposes of section 1001 of Title 18, United States Code, the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

§ 204. Regulations

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

§ 205. Compliance

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

§ 206. Exemptions

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

§ 207. Civil Penalty

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United

States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

§ 209. Criminal Penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

§ 210. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

§ 211. Immunity of Witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 212. Availability of Information to Other Federal Agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may be regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

§ 213. Administrative Procedure

Subject to section 203(j) the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 4, United States Code, shall apply to all proceedings under this title.

Chapter 2.
Domestic Currency Transactions

§ 221. Reports

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require

if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons Required to File Reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting Procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution,

except that (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Chapter 3.
Reports of Exports and Imports of Monetary Instruments

§ 231. Reports—Persons Required to File

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the follow-

ing information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

§ 232. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 231(i) either has not been filed or contains material omissions or mistatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until

the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

§ 233. Civil Liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 232.

§ 234. Remission of Forfeiture or Penalty

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

§ 235. Enforcement Authority

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 231 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Chapter 4.
Foreign Transactions

§ 241. Records and Reports Required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

§242. Classifications and Requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

Appendix C

31 C.F.R. § 103.

Note—After this litigation began and the District Court had rendered its opinion, the Secretary of the Treasury amended various sections of the Bank Secrecy Act regulations. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). For the convenience of the Court and counsel, we have set forth the amended regulations immediately following each of the sections to which the amendments apply. Additions to the original regulations are set in italics. Deletions are indicated by a line through the deleted word or words.

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 Meaning of Terms

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that

title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 103.11 Meaning of Terms [As Amended]

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank *(except bank credit card systems);*

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

~~(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;~~

(5) ~~(6)~~ a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type or commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 Determination by the Secretary

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of Currency Transactions

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Report of Transportation of Currency or Monetary Instruments

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures

or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instru-

ments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 Reports of Foreign Financial Accounts

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 Filing of Reports

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 Identification Required

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 Determination by the Secretary

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the

type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be Made and Retained by Financial Institutions

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 Additional Records to be Made and Retained by Banks

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer,

comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one ocasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.34 Additional Records to be Made and Retained by Banks [As Amended]

(a)(1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall *within forty-five days from the date such an account is opened,* secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. *In the event that a bank has been unable to secure the identification required herein with respect to an account within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if (i) it has made a reasonable effort to secure such identification, (ii) it maintains a list containing the names, addresses and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses and account numbers of those persons available to the Secretary as directed by him.*

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS-4 or SS-5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and in-

strumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (a) ambassadors, ministers, career diplomatic or consular officers, or (b) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions and immunities as an international organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10, and (viii) Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a)(3)(vii) and (viii) of this section, the bank shall, within fifteen days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpayer identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under Section 6109 of the Internal Revenue

Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn *for $100 or less or those drawn* on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item *in excess of $100* (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, invest-

ment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, ~~or investment securities,~~ and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check *in excess of $100* deposited in such account through its domestic processing system or to supply a description of a deposited check *in excess of $100*. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 Additional Records to Be made and Retained by Brokers and Dealers in Securities

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification

number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

§ 103.35 Additional Records to be Made and Retained by Brokers and Dealers in Securities [As Amended]

3. Subpart C is further amended by amending § 103.35 by deleting "paragraph (1)" in paragraph (a)(2), and substituting therefore the words "paragraph (a)(1) of this section"; and by deleting "subsection (1)" in paragraph (a)(3), and substituting therefor the words "paragraph (a)(1) of this section."

§ 103.36 Nature of Records and Retention Period

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person Outside the United States

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person

making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 Dollars as Including Foreign Currency

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or Other Reproductions of Government Obligations

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of Information

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired,

the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

§ 103.43 Availability of Information [As Amended]

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor. *Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.*

§ 103.44 Disclosure

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 Exceptions, Exemptions, ~~Modifications,~~ and Reports

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, ~~impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify,~~ the requirements of this part. Such exceptions, exemptions, ~~requirements or modifications~~ may be conditional or unconditional, may apply to particular persons or to classes

of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.45 Exceptions, Exemptions, Modifications, and Reports [As Amended]

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, *or* grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, *or* exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 Enforcement

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 Civil Penalty

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any

material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 Forfeiture of Currency or Monetary Instruments

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 Criminal Penalty

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 Enforcement Authority with respect to Transportation of Currency or Monetary Instruments

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 Effective Date

This part shall become effective July 1, 1972.

§ 103.51 Access to records [As Amended]

~~**This part shall become effective July 1, 1972.**~~

Except as provided in §§ 103.34(a)(1) and 103.35(a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 72-1196
FORTNEY H. STARK, JR., et al., *Appellants,*

VS.

GEORGE P. SHULTZ, et al., *Appellees.*

No. 72-985
CALIFORNIA BANKERS ASSOCIATION, *Appellant,*

VS.

GEORGE P. SHULTZ, et al., *Appellees.*

No. 72-1073
GEORGE P. SHULTZ, et al., *Appellants,*

VS.

CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., et al., *Appellees.*

On Consolidated Appeals from the United States District Court for the Northern District of California

BRIEF OF APPELLANTS
FORTNEY H. STARK, JR., ET AL.,
(No. 72-1196)

OPINION BELOW

The opinion of the Court below is reported at 347 F.Supp. 1242, and is set forth in the Appendix at pp. 75-93.

JURISDICTION

This is an action to enjoin the enforcement of an Act of Congress—the Bank Secrecy Act—because it is unconstitutional. On October 18, 1972, a three-judge District Court convened pursuant to 28 U.S.C. §2282 granted a preliminary injunction restraining the enforcement of portions of the Act and Regulations, and denied injunctive relief as to other portions of the Act and Regulations. Appellants[1] filed a timely notice of appeal in the District Court on November 17, 1972. By orders of Mr. Justice Douglas, appellants' time to docket this appeal was extended to March 2, 1973; the appeal was docketed within that time. Probable jurisdiction was noted on October 9, 1973, and related ap-

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[1]Appellants, the original plaintiffs in the District Court, are: Security National Bank; Fortney H. Stark, Jr.; Charles C. Marson; The American Civil Liberties Union of Northern California, Inc.; Fred Lieberman; Edward C. Harwood; Carl Bruer; and Edward Durell. They are, respectively, a national bank; its president, depositor, and customer; a bank customer; a controversial membership organization; and private citizens with financial interests abroad. Appellees (defendants below) are those charged with enforcement of the Act and Regulations: George P. Shultz, Secretary of the Treasury; William B. Camp, Comptroller of the Currency; Myles J. Ambrose, Commissioner of Customs; Johnnie M. Walters, Commissioner of the Internal Revenue Service; Herman Nickerson, Jr., Administrator of the National Credit Union; the Board of Governors of the Federal Reserve System; the Federal Home Loan Bank Board; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission.

peals consolidated.[2] This Court has jurisdiction under 28 U.S.C. §§1252 and 1253.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, First Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Fifth Amendment:

> . . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[2]This appeal is one of three from the same order. The government has appealed from the partial grant of injunctive relief in *Shultz, et al. v. The California Bankers Association,* No. 72-1073, O.T. 1972. The plaintiff in a case filed after this one and consolidated with it has appealed from the partial denial of injunctive relief in *The California Bankers Association v. Shultz, et al.,* No. 72-985, O.T. 1972.

The Bank Secrecy Act, Public Law 91-508, 84 Stat. 1114, 12 U.S.C. §§1829b, 1951-59, and 31 U.S.C. §§1051-1122, and the Regulations promulgated thereunder, 31 C.F.R. §103 (1972), are set forth in Appendices A and B to this brief.

QUESTIONS PRESENTED

1. Does the government violate the Fourth Amendment by forcing banks, financial institutions, and private citizens to report the details of entire categories of transactions in the absence of any warrant and any probable cause or other standard of materiality or relevancy, for the primary purpose of obtaining evidence of crime?

2. Does the government violate the Fourth Amendment by coercing banks to make and keep records unwanted and unneeded by them, irrelevant to their regulation, and which they would not otherwise make or keep, in order to create and preserve evidence for future criminal prosecutions?

3. Do the combined protections of the Fourth and Fifth Amendments prevent the government from forcing its citizens to create, retain, and supply documents expected to incriminate themselves and each other?

4. Does the First Amendment protect a controversial membership organization and its members from the forced making and retention by its bank of a list of its members and contributors, available to both legal and extralegal access?

STATEMENT OF THE CASE

The Bank Secrecy Act was enacted in 1970 for the primary purpose of creating, locating, preserving and collecting evidence of crimes. See discussion of legislative history, *infra*, pp. 19-27. The Act and its accompanying Regulations, 31 C.F.R. Part 103 (1972), force banks, other financial institutions and private individuals to make reports of financial transactions they would not otherwise make and to make and keep records of financial transactions which they would not otherwise make or keep. The scale of the reporting and recordkeeping demanded by the Act and Regulations is wholly unprecedented in American financial life and in American law.

The Reporting Requirements

The reporting requirements of the Act span Sections 1051 through 1122 of Title 31 of the United States Code. Section 1051 declares that the Congressional purpose is "to require certain reports . . . where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." To that end the Act arms the Secretary of the Treasury (the "Secretary") with an enormous arsenal of discretionary power—power to issue regulations "as he may deem appropriate to carry out the purposes" of the Act's reporting requirements (§1053); power to define the domestic financial transactions to be reported (§1081); power to define most of the important terms used in the Act (§§1052(c), (e)(21), (l)); power to require "procedures as he may deem appropriate to assure compliance" (§1054);

power to exempt any parties, transactions, or classes of parties or transactions from the Act (§1055); power to seek injunctions (§1057); power to assess and collect civil penalties (§§1056, 1103); power to remit forfeitures and civil penalties (§1104); and power to seek and execute search warrants in order to intercept the international transportation of illegally unreported cash or monetary instruments (§1105).

The Act does not specify the nature of domestic financial transactions to be reported; it simply requires reports to the Secretary "at such time, in such manner, and in such detail" as the Secretary may by regulation specify. This authority extends to any transaction which involves a domestic or foreign financial institution[3] and currency or monetary instruments. 31 U.S.C. §1081.

By regulations effective July 1, 1972, the Secretary established two domestic reporting requirements. First, he required routine reports of any transaction of more than $10,000 in currency from each financial institution involved, 31 C.F.R. §103.22[4] The

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[3]The Act defines the term "financial institution" to include everything from banks to jewelers, pawnbrokers, and travel agencies, and for good measure permits the Secretary to include in the definition any one he thinks performs "similar, related, or substitute functions . . ." 31 U.S.C. §1052(e).

[4]This requirement is subject to certain exceptions, the most important of which is that financial institutions need not report such transactions "with an established customer" where the bank thinks the amount "commensurate with the customary conduct of the business, industry or profession of the customer concerned." If the Secretary wants a report on any transaction not reported because of this exception, he may have it "upon demand."

Act requires the signature on the report of at least one principal party to the transaction, 31 U.S.C. §1082.

Second, the Secretary empowered himself, in a most remarkable regulation, to expand or contract the first requirement—as well as any other—immediately, at his whim, without notice, warning, or judicial or administrative supervision. 31 C.F.R. §103.45 empowered the Secretary "in his sole discretion" and "by written order or authorization . . . [to] impose additional . . . reporting requirements authorized by statute, or otherwise modify, the requirements" of any of the Regulations.[5]

The domestic reporting requirements, then, embraced currency transactions exceeding $10,000, and whatever other transactions the Secretary ordered reported.

The Act itself requires reporting of the details of two types of foreign financial transactions and relationships. 31 U.S.C. §1101 requires reports, by anyone

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[5]This Regulation provided in full:

§103.45 *Exceptions, Exemptions, Modifications and Reports*

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

This Regulation was slightly amended after these appeals were taken.

connected with the transaction, of the transportation into or out of the country of monetary instruments exceeding $5,000 on any one occasion. See also 31 C.F.R. §103.23. Second, 31 U.S.C. §1121 requires parties to any transaction or relationship with a "foreign financial agency" to make such reports or make and keep such records as the Secretary may require. The Secretary requires reports on yearly tax returns of any "financial interest in, or other authority over, a bank, securities or other financial account in a foreign country." 31 C.F.R. §103.24.

The Act and Regulations buttress these reporting requirements by substantial civil penalties (31 U.S.C. §§1056, 1102-03; 31 C.F.R. §103.47-48) and severe criminal penalties (31 U.S.C. §§1058-59; 31 C.F.R. §103.49). In obvious anticipation of the use of the reported information in criminal prosecutions, the Act requires the Secretary to make the reported information "available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal government" upon request, 31 U.S.C. §1061 (see also 31 C.F.R. §103.43), and requires the grant of use immunity to overcome any claims of self-incrimination, 31 U.S.C. §1060.

The Recordkeeping Requirements

The Bank Secrecy Act's record keeping requirements are found in 12 U.S.C. §1829b, as they relate to insured banks, and 12 U.S.C. §1951-59, as they relate to uninsured banks and other businesses and institutions. The stated purpose is the same as for the reporting requirements; to require records that have "a

high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U.S.C. §§1829b (a)(2); 1951(b).

The Act itself requires almost no records.[6] As in its reporting provisions, the Act empowers the Secretary to issue regulations "to carry out [its] purpose," 12 U.S.C. §1829b(a)(2) (b); to define institutions and persons affected, 12 U.S.C. §1953(a), (b)(5); see 31 C.F.R. §103.11; to make exemptions, exceptions, alterations or any other special arrangements, 12 U.S.C. §1829b(c), (f); see 31 C.F.R. 103.45; to seek injunctions, 12 U.S.C. §1954; and to assess and collect (or decline to assess and collect) civil penalties, 12 U.S.C. §1956; see 31 C.F.R. §103.47.

The Secretary has implemented these powers by requiring those having foreign financial accounts to record and retain their details, 31 C.F.R. §103.32, and by requiring all financial institutions to record and retain for stated periods enormous masses of information, including:

—details of each extension of credit unsecured by real property in excess of $5,000 (31 C.F.R. §103.33(a));

—records of each "advice, request, or instruction" concerning prospective foreign transactions of almost any type that exceed $10,000 (31 C.F.R. §103.33(b), (c));

[6]The Act does require that insured banks record and retain the identity of any individual required by the Act to report any transactions, 12 U.S.C. §1829b(c), (e). That requirement is reflected in 31 C.F.R. §103.26.

and by requiring banks to record and retain for stated periods:

—the social security or taxpayer identification number of account holders, and

—the original or a copy of:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not re-

quired to be kept, and not specifically exempted under subparagraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts, or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

> (10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.
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> 31 C.F.R. §103.34.

The shadow of the infinitely expandable regulation, 31 C.F.R. §103.45, also hung over these recordkeeping requirements, as it permitted the Secretary "in his sole discretion" and "by written order or authorization . . . [to] impose additional recordkeeping . . . requirements authorized by statute, or otherwise modify, the requirements" of the rest of the Regulations.

The recordkeeping requirements, like the reporting requirements, are enforceable by severe civil and criminal sanctions, 12 U.S.C. §§1955-57.

On June 7, 1972, appellants brought suit in the court below to enjoin the operation of the Act and Regulations and for declaratory and other relief, alleging their identities and capacities as persons subject to and affected by the Act and Regulations.[7]

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[7]Appellants Stark, Security National Bank, Marson, and the American Civil Liberties Union of Northern California, Inc., were plaintiffs when the suit was first filed. Appellants Lieberman, Harwood, Bruer and Durell were added in a First Amended Complaint, which was before the Court when plaintiffs' motion for preliminary injunction was heard and decided.

Appellant Security National Bank alleged its capacity as a national bank, the reports and recordkeeping required of it by the Act and Regulations, that such reporting and recordkeeping would force it to violate both good banking practice and its customers' right to privacy, and that it would cause the bank to lose significant numbers of customers and substantial bank deposits (App. 63, 66-68).

Appellants Stark and Marson alleged their capacities as bank customers,[8] the records required to be kept of their accounts, that by means of those records, which were subject to seizure by the Secretary without notice to them, their dues to organizations and associations could be easily and simply determined by the Secretary, and that they would thereby suffer a chilling effect upon their rights of association as protected by the First Amendment (App. 63-64, 69-70).

Appellant American Civil Liberties Union of Northern California, Inc., alleged its capacity as a nonprofit membership corporation having demand deposit accounts in a specified bank,[9] that it is regarded by many as a controversial organization, that it and its members desire to maintain the identities of its members and contributors in strict confidence; that the Act and Regulations would deprive it of its ability to maintain the anonymity of its members and

[8]Stark is a customer of appellant Security National Bank, Marson of the Bank of America (App. 63-64). Both banks are members of the California Bankers Association.

[9]Appellant ACLU maintains accounts in the Wells Fargo Bank, another member of the California Bankers Association (App. 68).

contributors, and that as a result it will lose significant numbers of its members and substantial contributions. (App. 64, 68-69).

Appellant Lieberman alleged that in the recent past he participated in transactions involving the transportation out of the United States of monetary instruments exceeding $5,000 in value, and that he would do so again in the near future (App. 64-65). Appellants Lieberman, Harwood, Bruer and Durell alleged their capacities as persons maintaining financial interests in and signature authority over one or more bank accounts in foreign countries (App. 64-65).

On June 22, 1972, the California Bankers Association, whose members are all of the 158 state and national banks in California, filed an action for identical relief. The Association alleged its members' capacities as banks; that implementation of the Act and Regulations would cost them many thousands of dollars per year; that each member bank's relationship with its depositors is founded upon the maintenance of confidentiality of the depositors' business transactions; that by virtue of the destruction of that relationship occasioned by compliance with the Act and Regulations, the member banks will lose numerous customers' good-will, confidence, deposits and accounts; and that compliance would make its members unwilling agents of and co-conspirators with the government in illegal intrusion into the First, Fourth, Fifth Amendment, and privacy rights of their customers (App. 9-14).

The actions were consolidated and a three-judge court was convened pursuant to 28 U.S.C. §2282. A single judge issued a temporary restraining order on June 29, 1972, restraining the operation of the reporting (but not the recordkeeping) provisions of the Act and Regulations, and calendared plaintiff's motions for preliminary injunction for July 17, 1973.

Pursuant to Local Rule 115 of the District Court,[10] plaintiffs' motions were heard and decided on affidavits alone. The affidavits, which were uncontested, established these, among other, facts:

—The plaintiff Security National Bank had not and, but for the Act and Regulations, would not make or keep substantial numbers of records required to be made or kept by the Act and Regulations (App. 54-55);

—The customers of plaintiff Security National Bank approved of its role in the litigation, were concerned for the privacy of their accounts, and caused the General Counsel of the bank to conclude that "compliance with the Act and Regulations at issue . . . will cause our bank to lose a substantial [amount] of customer confidence, customers and deposits" (App. 28-29);

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[10]Rule 115, Local Rules of Practice, United States District Court for the Northern District of California, provides in relevant part:

Rule 115

Affidavits on Motions

(a) Use of Affidavits. Factual contentions involved in any pre-trial or post-trial motion shall be initially presented and heard upon affidavits. Oral testimony will not be received at hearings on such motions except as the court may require or allow oral examination of the affiants to resolve factual issues shown by the affidavits to be in dispute.

—The cost to just one bank (the Bank of America) of implementing the Act and Regulations for the first year alone would be $392,631.84 (App. 24-25);

—Many members of the plaintiff American Civil Liberties Union of Northern California, Inc., historically regarded by some as dissident and dangerous and historically a target for retaliation, are greatly reluctant to have that affiliation become known by employers, government, and the public at large; many are employed in the armed forces, the aerospace industry, education and government jobs. Most of them contribute by check (App. 33-34, 52-53).

The defendants filed no affidavits or answer and presented no evidence. Defendants contented themselves with a Motion to Dismiss, which was denied without prejudice.

After extending the temporary restraining order and taking the motions for preliminary injunctions under submission, the three-judge court (one judge dissenting) enjoined the operation of the reporting requirements of the Act and Regulations insofar as they related to domestic transactions because they violated the Fourth Amendment's prohibition of unreasonable searches and seizures, finding the relationship between the scope of the seizure and its purpose "farfetched." From this ruling and the resultant partial preliminary injunction the government has appealed.

However, the District Court unanimously upheld the reporting requirements concerning foreign transactions, two judges feeling compelled to that result

by this Court's holding in *United States v. United States District Court,* 407 U.S. 297 (1972), and unanimously upheld, without explanation, all of the recordkeeping requirements imposed by the Act and Regulations.

From these latter rulings and the resultant partial denial of their motion for a preliminary injunction, these appellants appeal.

SUMMARY OF ARGUMENT

About 20 billion checks pass through their makers' American banks each year. 116 Cong.Rec. 16961 (1970). They reflect transactions as varied as American financial life. A tiny fraction of those transactions may evidence criminality. A very few may be of interest to some regulatory agency. But most—checks to grocers, landlords, automobile dealers, and the like—are untainted by wrongdoing, irrelevant to regulation, and of no legitimate interest to the government.

The Bank Secrecy Act requires that banks, on pain of severe civil and criminal sanctions and at their own expense, copy and retain not only the fronts and backs of all those checks but also millions of other documents reflecting transactions equally innocent, equally unregulated, and equally of no legitimate interest to government. It does so for the primary and express purpose of creating and preserving evidence of crime.

The Bank Secrecy Act requires that financial institutions and parties to large financial transactions submit the documentary details of those transactions to the government, regardless of their nature, regardless of their guilt or innocence, and regardless of their relevancy to any legitimate interest of government. It does so for the same primary purpose—collecting evidence of crime.

Appellants urge that the Act constitutes the largest mass search and seizure within memory—a search and seizure undertaken without the slightest heed to the requirements of the Fourth Amendment that searches and seizures be authorized by warrant, carefully limited in scope, and supported by probable cause or its administrative equivalent.

Appellants argue here that the reports required by the Act are outright seizures that violate all those well-established restrictions, and that the records made and kept by virtue of the Act are made and kept by unwilling agents of the government—agents who, in the act of making and keeping them, perform the same mass searches and seizures accomplished by the reporting provisions of the Act.

Appellants believe and argue that the Fourth and Fifth Amendments "run almost into each other," *Boyd v. United States,* 116 U.S. 616, 630 (1886), to prohibit the government from forcing its citizens to create, keep, and supply evidence for governmental use against themselves and each other.

Finally, the appellant American Civil Liberties Union of Northern California, Inc., urges that its

existence as a controversial membership organization —the anonymity of whose members is protected by the First Amendment—is gravely undermined when the government forces its bank to make and keep available a list of its members and contributors for no reason other than the anticipatory creation of what the government hopes will be evidence of unstated future crime.

ARGUMENT

I.

THE ANTICIPATORY CREATION AND COLLECTION OF EVIDENCE FOR USE IN CRIMINAL AND CIVIL PROCEEDINGS ACCOMPLISHED BY THE REPORTING PROVISIONS OF THE BANK SECRECY ACT CONSTITUTE A MASSIVE, INDISCRIMINATE, AND WHOLLY UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT.

A. The Bank Secrecy Act is almost exclusively aimed at the enforcement of the criminal law, and must therefore be measured against the limits appropriate to criminal law enforcement.

The language and legislative history of the Bank Secrecy Act leave no doubt that its dominant—almost exclusive—purpose is to create and collect evidence of crime.

The statements of purpose in the Act (see 31 U.S.C. §1051; 12 U.S.C. §§1829b(a)(2); 1951(b)) say it is intended to require reports and records useful in "criminal, tax, and regulatory" law enforcement—a cryptic phrase spanning the whole of enforceable law —and always list the criminal purpose first. The Act's provisions for distribution of evidence through-

out the federal government, 31 U.S.C. §1061, use immunity to overcome claims of self-incrimination, 31 U.S.C. §1060, and additional criminal penalties for violations of the Act in assistance of other federal crimes, 12 U.S.C. §1957, 31 U.S.C. §1059, all attest to the primary goal of criminal law enforcement.

The legislative history of the Act makes the dominance of the criminal law enforcement purpose unmistakable. The bill, H.R. 15073 (1970), by Representative Patman, was reported favorably from the House Banking and Currency Committee in House Report No. 91-975, 2 U.S. Code Cong. & Admin. News 4394 (1970) (hereafter "House Report"), and was debated and passed on the floor of the House on May 25, 1970, 116 Cong.Rec. 16949 and ff. (1970). A nearly identical bill, S. 3678 (1970), by Senator Proxmire, was reported favorably from the Senate Banking and Currency Committee in Senate Report No. 91-1139 (hereafter "Senate Report"), debated and passed on the floor of the Senate on September 18, 1970, 116 Cong.Rec. 32621 and ff. (1970), and sent to a conference committee. The Conference Committee made minor alterations and reported the House bill favorably in lieu of the Senate version, Conference Report No. 91-1587, 2 U.S. Code Cong. & Admin. News 4411 and ff. (1970). The bill was then passed by both houses and was signed by the President on October 26, 1970.

The House Report begins its explanation of the bill by noting an "increase in criminal activity" utilizing financial institutions, House Report at 4395.

"Petty criminals, members of the underworld, those engaging in 'white collar' crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs." *Ibid.* Nearly all of the justification presented for the Act in the House Report relates exclusively to the enforcement of the criminal law. The requirement of the Act (12 U.S.C. §1829b(c); 31 C.F.R. §103.34(a)) that banks require identification of account holders, for example, was justified because "the identity of such individuals provides an important key in the investigation and prosecution of criminal activity." *Id.* at 4396. The reason for requiring large domestic cash transactions to be reported is similarly straightforward:

> Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from proceeds of a lottery racket to money for the bribery of public officials.
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> *Ibid.*

See also House Report at 4396, 4400, 4404.

The debates on the floor of the House settle any doubt about the dominant purpose of the bill. Its first sponsor said:

> With respect to full financial recordkeeping, the problem can be simply stated; in the past decade, as organized crime and criminals have become more sophisticated, more and greater use has been made by criminal elements of our Nation's finan-

> cial institutions. Law enforcement officials believe that an effective attack on organized crime requires the maintenance of adequate and appropriate records by financial institutions.
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> 116 Cong.Rec. 16950 (1970).

The bill's author then rose on this note: "This is really a bill which, if enacted into law, will be the longest step in the direction of stopping crime than any other we have had before this Congress in a long time." *Id.* at 16951. The bill, Representative Patman explained, was originally conceived simply as a measure to prevent illegal use of foreign bank accounts. But, he said,

> [w]e also discovered that secret foreign bank accounts were not the only criminal activities related to the banking field. The major law enforcement authority—the Justice Department—of the U.S. Government called our attention to the urgent need for regulations which would make uniform and adequate the present recordkeeping practices, or lack of recordkeeping practices, by domestic banks and other financial institutions.
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> *Id.* at 16951.

Returning for the time to foreign bank accounts, the author warned that "American criminals from the simple tax evader to members of the organized underworld discovered that secret Swiss accounts had a use of particular interest to them." *Ibid.* Stating that such accounts "have been used in support of an almost limitless variety of criminal schemes," *ibid.*, Representative Patman then summarized "some of the cases discussed in testimony before the committee" concern-

ing the need for information about foreign bank accounts. *Ibid.* He proceeded, *id.* at 51-52, to summarize the facts of sixteen separate cases which illustrated the need for the bill. Fifteen of them were criminal cases; the sixteenth, civil fraud.

In explaining the recordkeeping requirements of the bill, Representative Patman frankly stated that they had originated with the Justice Department and the Internal Revenue Service, *id.* at 16953, in response to two problems. The first was that "[a] trend was developing in the larger banks away from their traditional practices of microfilming all checks drawn upon them." *Ibid.* This had hampered prosecutors. *Ibid.* The second problem was the identification of depositors: "A typical example might involve a situation where a person with a criminal reputation holds an account but does not personally make deposits or withdrawals." *Ibid.*

Financial institutions other than banks were added, Representative Patman explained, because "we did not want to drive criminals away from using banks only to the use of other financial institutions." *Id.* at 16954.

The author's discussion of the broad exemptive powers of the Secretary[11] was particularly revealing.

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[11] 31 U.S.C. §1055 provides, in relevant part:

> The Secretary may make such exemptions from any requirement otherwise imposed under this chapter as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof . . .

See also 31 C.F.R. §103.45; Senate Report at 4, 7.

The purpose of the provisions enabling the Secretary to make such exemptions is to enable him to exempt "legitimate" business entirely from the Act:

> It may be felt that we are so shackling international commerce that tremendous damage may be done to the foreign trade position of this country. Equipped with this exemptive power, the Secretary of the Treasury will be able to let legitimate international commerce flow free and unfettered. The Secretary's primary responsibility under Title II [the reporting provisions] is to see to it that criminals do not take undue advantage of international trade and go undetected and unpunished.
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> *Ibid.*

Mr. Patman summarized by saying:

> . . . I would be the first to admit that this legislation does not provide perfect crime prevention. However, it is felt that the legislation will substantially increase the risk of discovery of any criminal who undertakes to hide his activity behind foreign secrecy.
>
> *Ibid.*

Representative Patman concluded by introducing into the record a lengthy newspaper article entitled "Congress Aims at Organized Crime's Moneybags," an article describing the Bank Secrecy Act as half of a pair with the then-pending Organized Crime Control Act. *Ibid.*

Desultory debate followed, during which Representative Pepper, Chairman of the House Select Committee on Crime, rose to commend the members of the

Banking and Currency Committee "for this important weapon which they have forged against the ugly octopus of organized crime," *id.* at 16965. The bill was adopted by a vote of 302 to 0. *Id.* at 16972-73.

The central purpose of the Bank Secrecy Act—criminal law enforcement—is equally apparent from the Senate Report and the debates on the floor of the Senate. Excerpts from the Senate Report follow:

> The purpose of the bill is to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime.
>
> Senate Report at 1.

> Copies of checks are valuable in investigating domestic crimes as well as those involving secret foreign bank accounts. For example, a single microfilmed check in the amount of $5.20 helped in the conviction of Frank Costello.
>
> *Id.* at 5.

> Reports are not a foolproof method for preventing organized crime from sending currency out of the country. Obviously, a criminal who is already breaking the law could just as easily ignore the reporting requirement. The significance of requiring reports is that it provides the Justice Department with another means of obtaining a conviction. The mere failure to file a report would constitute a criminal violation . . .
>
> *Id.* at 7.

> It is believed that these penalties will constitute a significant deterrent to organized crime. At the same time, the Secretary has broad discretionary

> authority to return seized currency or waive the civil penalties which he could use to prevent ordinary citizens or businessmen from being unduly penalized for an inadvertent violation.
>
> *Ibid.*

> The objective of the chapter [requiring reports] is to aid law enforcement authorities to prosecute U.S. criminals.
>
> *Ibid.*

> There is no assurance that the recordkeeping requirements will end the misuse of foreign bank accounts. White-collar criminals may not be expected to keep elaborate records of their foreign financial transactions if those records establish the illegal nature of their activities. However, the mere failure to keep the records required by the regulations constitutes a criminal violation. Thus, law-enforcement officials could obtain convictions of stock swindlers, tax evaders, and other white-collar criminals for a failure to keep records, while it might be more difficult to prove the exact range of their other illegal activities.
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> *Id.* at 8.

The debate on the Senate floor continued in the same vein. Senator Proxmire, the author, rose to proclaim that ". . . the purpose of the bill is to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." 116 Cong.Rec. 32627 (1970). After lengthy discussion of the effect of proposed amendments upon that goal, the bill was sent to a conference committee, which reported out the House version of the bill. *Id.* at 32644.

In light of the provisions of the Act and its legislative history, it cannot be disputed that the dominant purpose of the Bank Secrecy Act is the creation, preservation, and collection of evidence of crime. It is against the standards applicable to the criminal law, then, that its constitutionality must be measured.

B. Bank customers and banks have a reasonable expectation of privacy in the documents detailing their private financial transactions.

"Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally 'justifiable' —what expectations the Fourth Amendment will protect in the absence of a warrant." *United States v. White,* 401 U.S. 745, 752 (1971). We argue here that bank customers and banks have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected by their bank accounts.

The bank appellants alleged in the court below that their business depended upon the maintenance of confidentiality concerning their customers' accounts,[12] and proved by affidavit[13] that such was the case. This assertion has ample support.

It is hornbook law[14] that bank customers may expect their banks to treat their financial affairs as confi-

[12]App. 12-13, 68.

[13]App. 19-22.

[14]. . . it is an implied term of the contract between the banker and his customer that the banker will not divulge to third persons without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the

dential. "The right of privacy and the right to keep confidential one's financial affairs is well recognized." *Hecht v. Pro-Football, Inc.* 46 F.R.D. 605, 607 (D.D.C. 1969). In perhaps the leading case, the California Supreme Court struck down as a violation of the constitutional right to privacy a statute requiring the disclosure by public officials of financial interests exceeding $10,000. *City of Carmel-by-the-Sea v. Young,* 2 Cal.3d 259 (1970).

Violation of that privacy by a bank has frequently been held to create a cause of action in contract. See, e.g., *Milohnich v. First Nat'l Bank,* 224 So.2d 759 (Fla.Ct.App. 1969), and authorities cited; *Sparks v. Union Trust Co.,* 256 N.C. 478, 124 S.E.2d 365 (1962); *Peterson v. Idaho First Nat'l Bank,* 83 Idaho 578, 367 P.2d 284 (1961).

Even as between private parties, the public allegation of debt arising out of private financial transactions has been traditionally held to invade privacy, whether true or false. See, *e.g., Trammel v. Citizens News Co.,* 285 Ky. 529, 148 S.W.2d 708 (1941); *Biederman's of Springfield v. Wright,* 322 S.W.2d 892, 896 (Mo. 1959), and cases cited.

Brex v. Smith, 104 N.J.Eq. 386, 146 A. 34 (1929), is particularly relevant here. In *Brex* the court enjoined a prosecutor from obtaining the bank records of all the city's policemen, holding that the depositors had a "property interest" in the information in their

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banker is compelled to do so by court order, the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it.
10 Am.Jur.2d, *Banks,* §332.

accounts and that the bank had "an implied obligation . . . to keep these [accounts] from scrutiny until compelled by a court of competent jurisdiction to do otherwise." See also *United States v. First Nat'l Bank of Mobile,* 67 F.Supp. 616 (S.D.Ala. 1946).

The District Court was quite right in concluding that:

> . . . within these limitations . . . a bank customer does expect a degree of privacy in these matters and . . . such an expectation is one that society has been prepared to recognize as 'reasonable.' 347 F.Supp. at 1248-49, App. 86.

See *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).[15]

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[15]The Government argues in its Jurisdictional Statement in its consolidated appeal (p. 17) that persons engaged in large currency transactions have no justifiable expectation of privacy in those transactions because "banks have been reporting such transactions for more than twenty-five years" under the Trading with the Enemy Act. This, if true, would undoubtedly surprise most bank customers. But it was partly the insufficiency of the Trading with the Enemy Act which prompted the Bank Secrecy Act, see, *e.g.,* 116 Cong.Rec. 16954 (1970); it required banks to make a subjective judgment on the legitimacy of a transaction before deciding to report it. Moreover, the argument only affects the reasonable expectation of privacy in large cash transactions, not any other kind. At that, the argument is wrong; in *City of Carmel-by-the-Sea v. Young, supra,* the California Supreme Court struck down a disclosure statute dealing only with holdings worth more than $10,000, the exact limit at issue here. Finally, the Trading with the Enemy Act had both its origin and justification in the War Power, arguments unavailable in this case.

This Court should firmly reject any notion that the existence of the Bank Secrecy Act, public knowledge of it, or the regrettably frequent incidents of "informal"—i.e., illegal— access to bank accounts have any bearing upon the existence or reasonableness of the expectation of privacy. We respectfully venture that this Court would have reached no different results in *United States v. United States District Court,* or *Katz v. United States,* both *supra,* if the government had purchased lavish advertisements on television and

C. Governmental compulsion to produce documents has traditionally been treated as a search and seizure subject to the limitations of the Fourth Amendment.

The right to be secure in one's papers has been applied in a long and unbroken line of this Court's decisions to the compulsory production of one's books and records. See, *e.g., Boyd v. United States,* 116 U.S. 616 (1886) (court order to produce invoice), in which this court held that:

> . . . a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure. 116 U.S. at 622.

Accord: *Hale v. Henkel,* 201 U.S. 43, 76 (1906) (subpoena duces tecum); *Oklahoma Press Publ. Co. v. Walling,* 327 U.S. 186, 214-16 (1946) (subpoena duces tecum); *United States v. Morton Salt Co.,* 338 U.S. 632, 651-52 (1950) (administrative order to report based upon statute); *See v. City of Seattle,* 387 U.S. 541, 545 (1967) (discussion of administrative subpoenas). See also *McMann v. Securities and Exchange Comm'n,* 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand, J.).

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in the newspapers announcing that henceforth everyone's telephone was subject to being tapped. Any other result would permit the abolition of a reasonable expectation of privacy merely by giving publicity to its violations. *Cf. In re Heutsche,* ..... U.S. ....., 42 U.S.L.W. 3224-25 (Oct. 15, 1973) (Douglas, J., dissenting).

Early this year this Court once again recognized that distinguished line of decisions when, in *United States v. Dionisio,* ..... U.S. ....., 35 L.Ed.2d 67, 78 (1973), it said:

> The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms 'to be regarded as reasonable.'

The reports demanded by the Bank Secrecy Act must, therefore, be treated as outright searches and seizures subject to the restrictions of the Fourth Amendment.

D. The reports required by the Act are unreasonable searches and seizures because they are accomplished without a warrant or judicial supervision of any kind.

It is a cornerstone of this Court's Fourth Amendment jurisprudence that a search and seizure conducted without a warrant is *per se* unreasonable, subject to certain "jealously and carefully drawn" exceptions, *Jones v. United States,* 357 U.S. 493, 499 (1958) (Harlan, J., for the Court). *Almeida-Sanchez v. United States,* ..... U.S. ....., 37 L.Ed.2d 596, 606-07 (1973) (Powell, J., concurring); *United States v. United States District Court,* 407 U.S. 297, 316 (1972); *Coolidge v. New Hampshire,* 403 U.S. 443, 470-71 (1971); *Vale v. Louisiana,* 399 U.S. 30, 34-35 (1970); *Chimel v. California,* 395 U.S. 752, 762 (1969); *Mancusi v. Deforte,* 392 U.S. 364, 370 (1968); *Katz v. United States,* 389 U.S. 347, 356-57 (1967); *Camara v. Municipal Court,* 387 U.S. 523, 528-29 (1967); *Stoner v. California,* 376 U.S. 483, 486 (1964); *Preston v. United States,* 376 U.S. 364, 367

(1964); *Chapman v. United States,* 365 U.S. 610, 613-15 (1961); *United States v. Jeffers,* 342 U.S. 48, 51 (1951); *Johnson v. United States,* 333 U.S. 10, 13-15 (1948); *Agnello v. United States,* 269 U.S. 20, 32 (1925).

The seizures accomplished by the reporting requirements of the Bank Secrecy Act proceed with absolute unconcern for the warrant requirement, even though the primary purpose of the Act is creating and collecting evidence for use in criminal cases. None of the exigent circumstances held to excuse the absence of a warrant can conceivably apply to searches and seizures that are wholly anticipatory, as these are. The searches and seizures are therefore unreasonable *per se.*[16]

The fact that a secondary purpose of the Act is the creation and collection of evidence of regulatory vio-

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[16]Nothing in the "required records" doctrine of *Shapiro v. United States,* 335 U.S. 1 (1948), alters this conclusion. That doctrine applies only to the claim of self-incrimination, not to the legality of a warrantless search and seizure. Moreover, the doctrine, as recently explained in *Grosso v. United States,* 390 U.S. 62, 67-68 (1968), has three requirements:

> . . . first, the purposes of the United States' inquiry must be essentially regulatory, second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents.

None of these requirements is present here. The purpose of the Act is primarily to aid criminal prosecutions; its secondary purpose is to aid in enforcement of unstated regulatory schemes the sum total of which do not affect all the transactions required to be reported. The information is not of the kind "customarily kept" by the parties; if it were, there would be no need to require it. Nor do the documents demanded have "public aspects" which would render them analogous to public documents.

lations hardly justifies the abandonment of the Fourth Amendment rules concerning criminal prosecutions.[17] Even assuming, however, contrary to the language and history of the Act, that its purpose is wholly regulatory, still the warrant requirement cannot be forgotten entirely. *Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967). Although the Court long ago upheld, as against a Fourth Amendment claim, the power of an Internal Revenue Service agent to demand documents by administrative summons, *First Nat'l Bank v. United States,* 267 U.S. 576 (1925) (see also 26 U.S.C. §7602), that result depends, among other factors, upon the existence of judicial supervision: the summons cannot be enforced without the scrutiny and subsequent order of a court. See *Donaldson v. United States,* 400 U.S. 517 (1971); *Couch v. United States,* ..... U.S. ....., 34 L.Ed.2d 548 (1973). No such supervision exists here; violations of the reporting provisions of the Act are punishable harshly and instantly, by civil sanctions wielded by the Secretary and by criminal penalties as well. 12 U.S.C. §§1955-56; 31 U.S.C. §§1056, 1058.[18]

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[17] *Cf.* Mr. Justice Brennan's statement, concurring in *Grosso, supra:*

> Whatever else Congress may have means to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use in their prosecution.
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> 390 U.S. at 74.

[18] Nor does the fact that the seizures are authorized by an Act of Congress rescue them from unconstitutionality: ". . . [N]o Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States, supra,* 37 L.Ed.2d at 602. This Court has, it is true, approved some congressionally authorized searches without warrants. *United States v. Biswell,* 406 U.S. 311 (1972); *Colon-*

Because the Bank Secrecy Act wholly ignores the warrant requirement in its reporting provisions, those provisions are void both in their primary criminal application and in their secondary regulatory function as well.[19]

We do not distinguish here between the reporting of domestic and foreign transactions, as did the District Court. The District Court felt compelled to that result by *United States v. United States District Court, supra,* 347 F.Supp. at 1245; App. 78. There the distinction between foreign and domestic surveillance had a statutory basis, 18 U.S.C. §2511(3); nonetheless this Court twice expressly declined to rule on the possible application of its opinion to foreign surveillance. 407 U.S. 308, 321-22. Whatever the difference may be between executive power to conduct surveillance to protect against domestic and foreign enemies,

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nade Catering Corp. v. United States, 397 U.S. 72 (1970). But these searches are hardly "warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the Government." Surveillance of their customers can hardly be characterized as one of the "burdens" of banks. Banks can hardly be said to have consented to the surveillance forced upon them for purposes unrelated to banking. A bank customer does not, as Mr. Justice Powell put it, "[submit] to inspections in exchange for a special perquisite." And the amazing determination that, for example, *all* checks passing through American banks have a "high degree of usefulness" in law enforcement is a determination made largely by the Secretary, not the congress, and does not rise to the level of "the considered judgment of Congress" mentioned by Mr. Justice White. *Almeida-Sanchez v. United States, supra,* at 601-02, 607, 613.

[19] *Wyman v. James,* 400 U.S. 309 (1971), is inapplicable here. Five members of the Court in *Wyman* did not even find that a search was contemplated, an issue not present here. See 400 U.S. at 316-18. On the assumption that a search was involved, six members of the Court found eleven reasons why the search was reasonable, *id.* at 318-24. Not one of those eleven reasons is relevant here.

the factors influencing the extent of that power are not present here—the foreign reporting requirements are expressly aimed at *domestic* criminal suspects. Finally, documentation of the financial details of foreign transactions—as opposed to contraband in transit—has been held entitled to full Fourth Amendment protection against unreasonable searches and seizures at least since *Boyd v. United States,* 116 U.S. 616 (1886), in which the document held obtained by an unreasonable search and seizure was a shipping invoice for 29 cases of plate glass imported into the United States from a foreign country. 116 U.S. at 618.[20]

E. The reports required by the Act are unreasonable searches and seizures because they are wholly excessive in scope and totally lacking in particularity.

One of the central functions of the warrant requirement of the Fourth Amendment is to ensure that the requirement of particularity in the Amendment's second clause is respected. *Coolidge v. New Hampshire, supra,* 403 U.S. at 467; *Berger v. New York,* 388 U.S. 41, 55-60 (1967) (Clark, J., for the Court). Without judicial supervision a search "reasonable in its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio,* 392 U.S. 1, 18 (1968). The restriction on scope applies, of course, whether or not a warrant has been obtained. See, *e.g., Von Cleef v. New Jersey,* 395 U.S.

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[20]It is worth noting that every commentator who has addressed the distinction drawn by the District Court has rejected it. See, *e.g.,* Note, 37 Albany L.Rev. 566, 577 (1973); Note, 51 Texas L.Rev. 602, 603 n. 11 (1973); Note, 14 William and Mary L.Rev. 929, 950-51 (1973).

814 (1969) (warrantless seizure of several thousand articles held invalid); *Stanford v. Texas,* 379 U.S. 476 (1965) (seizure pursuant to warrant of more than 2,000 items of literature held invalid); *Kremen v. United States,* 353 U.S. 346 (1957) (warrantless seizure of contents of cabin held invalid).

This restriction on the scope of search and seizure extends to the administrative seizure of documents, and may invalidate an otherwise valid seizure:

> . . . because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds.

McMann v. Securities and Exchange Comm'n, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand, J.). Thus even wholly administrative searches have been invalidated because unreasonable in scope. See, *e.g., United States v. Theodore,* ____ F.2d ____, 41 U.S.L.W. 2670 (4th Cir., May 31, 1973) (IRS summons demanding more than 1500 tax returns and accompanying documentation held unreasonable fishing expedition); see also *United States v. Harrington,* 388 F.2d 520, 523 (2d Cir. 1968); *United States v. Dauphin Trust Co.,* 385 F.2d 129 (3rd Cir. 1967).

Almost any conceivable application of this rule to the reports required by the Bank Secrecy Act invalidates those reports. No reliable estimates tell us how many domestic cash transactions involving more than $10,000 occur, or how many monetary instruments worth more than $5,000 cross American borders each

year. Whatever their number, however, only a small portion can be of interest to criminal and regulatory schemes. The mass seizure of the documentary details of all such transactions is wholly "out of proportion to the end sought,"[21] and is in effect exactly the sort of general warrant the Fourth Amendment was designed to guard against. See generally *Stanford v. Texas,* 379 U.S. 476 (1965).

F. The reports required by the Act are unreasonable searches and seizures because they are conducted without probable cause and without adherence to any other standard of materiality or relevancy.

For criminal purposes the Fourth Amendment explicitly commands that searches and seizures be supported by probable cause. See, *e.g.,* Rule 41(c), Federal Rules of Criminal Procedure.[22]

By definition it is impossible for the reports required by the Bank Secrecy Act to meet this or any

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[21]The massive, impersonal, indiscriminate seizures authorized by the Act readily invite comparison to the "ridiculous warrant against the whole English nation" condemned in *Wilkes v. Wood,* 19 How. St. Tr. 1153 (1763), and the hated "general warrants" condemned in *Entick v. Carrington,* 19 How.St.Tr. 1029 (1765). See II May's Constitutional History of England, 246 (Am.Ed. 1864); *Stanford v. Texas,* 379 U.S. 476, 483-84 (1965).

[22]Substantive standards of materiality and relevancy differ for administrative summons and subpoenas; the probable cause requirement of the Fourth Amendment is satisfied by reasonable relevancy to a particular purpose:

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness . . .

See v. City of Seattle, 387 U.S. 541, 545 (1967). But as a minimum the subpoena must be "sufficiently . . . relevant in purpose," *id.* at 544, to satisfy the Fourth Amendment. Most statutes authorizing administrative searches codify this standard. See, *e.g.,* 26 U.S.C. §7602 (agent of IRS may examine books and papers which are "relevant or material" to a specific inquiry).

other articulable standard of relevancy, because, being anticipatory, they relate to no particular investigation, proceeding, or regulatory scheme. The fact that they are all-purpose does not justify the fact that they are without limit; their general purpose argues for a high standard rather than none at all.[23] Because they seek to serve investigations and proceedings not yet begun or even imagined, it is impossible for them to be measured against any criminal or civil limitation on materiality and relevancy. Without discrimination they seize the documentary details of transactions which may be laden with criminality or wholly innocent of it; transactions which may be highly important to a regulatory scheme or completely divorced from any present, future, or even permissible regulatory activity. To permit such wholly anticipatory searches and seizures would be not just to abandon the requirement of probable cause, but to forfeit every measurable standard of materiality and relevancy imposed by the Fourth Amendment.

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[23]Mr. Justice Stewart's view of the eavesdropping invalidated in *Berger v. New York, supra,* 388 U.S. at 69, applies perfectly here:

> The need for particularity and evidence of reliability in the showing required when judicial authorization is sought . . . is especially great. The standard of reasonableness embodied in the Fourth Amendment matches the degree of intrusion. By its very nature electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort.

The intrusion in *Berger,* by comparison with the Bank Secrecy Act, is minor indeed.

II.

THE COERCED CREATION AND RETENTION OF DOCUMENTS FOR POSSIBLE FUTURE USE IN CRIMINAL AND CIVIL PROCEEDINGS—FORCED UPON PRIVATE CITIZENS BY THE RECORDKEEPING REQUIREMENTS OF THE BANK SECRECY ACT—VIOLATE THE FOURTH AMENDMENT'S PROHIBITION OF UNREASONABLE SEARCHES AND SEIZURES.

A. Records which would not be made or kept but for the commands of the Act suffer all the constitutional infirmities of the reports required by the Act because instantly transmutable into reports under 31 C.F.R. §103.45.

Regulation 31 C.F.R. §103.45, as it existed when the District Court ruled,[24] permitted the Secretary "in his sole discretion," to "impose additional recordkeeping or reporting requirements," by a simple "written order or authorization," a term which the Secretary retained the power to define. 31 C.F.R. §103.45(b).

Thus the Secretary could order the immediate reporting of any records made or kept under the compulsion of the Act, usually without notice to the subject of the records and always without judicial intervention of any sort. Insofar as records could be transmuted into reports under 31 C.F.R. §103.45, their

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[24]The fact that the Regulation has since been amended to reduce its drastic scope neither undercuts the District Court's decision nor moots the controversy. Changes in administrative regulations in response to successful litigation are common. In *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), for example, a new police regulation prohibiting mass searches that were the subject of the litigation was held not to end the controversy: "[P]rotestations of repentance and reform timed . . . to blunt the force of a lawsuit offer insufficient assurance" that the conduct will not be repeated. *Id.* at 203. See also *Gray v. Sanders*, 372 U.S. 368 (1963); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953).

compulsion suffers from all the defects ascribed above to the reporting provisions of the Act.

B. A bank is the agent of government whenever, under compulsion, it makes or keeps records it would not otherwise make or keep and which are irrelevant to its regulation. The making or keeping of such records therefore constitutes a search and seizure at the time they are made or kept.

If a private person for his own purposes enters the dwelling of another, rightfully or wrongfully, and finds and reports contraband, no search governed by the Fourth Amendment has occurred. See, *e.g., Burdeau v. McDowell,* 256 U.S. 465 (1921). But if a federal official "had a hand" in the search, even by making a request that could be refused, it is a governmental search. *Lustig v. United States,* 338 U.S. 74, 78 (1941) (Frankfurter, J.).

Thus, searches made by private parties at governmental request are governmental searches—whether or not the private party could rightfully have searched in the absence of governmental influence. See, *e.g., Corngold v. United States,* 367 F.2d 1 (9th Cir. 1966), in which an airline employee who searched luggage at police request was held an agent of the government in so doing, notwithstanding the fact that the contract of carriage reserved to the airline the right of inspection. See also *Stoner v. California,* 376 U.S. 483 (1964); *United States v. Jeffers,* 342 U.S. 48 (1951).

If the mere request to make a search creates an agency relationship, then *a fortiori* the command to do so creates the same relationship. Here, in the

making and retention of records that a bank would not make or retain but for the coercion of the Act, the bank acts as the agent of the government when such records are made or kept.[25]

Perhaps because the result is so obvious, appellants have been unable to find decisions concerning an agency relationship based upon a command of law to do an affirmative act on pain of civil and criminal penalties.[26] But this Court has found it necessary on many occasions to draw the line between governmental and private action, and in many cases governmental involvement far less than outright coercion has been held sufficient to make constitutional guarantees applicable to nominally "private" behavior.

Thus, in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the state's action as a "joint participant" was held to indicate "that degree of state participation and involvement" necessary to support a finding of state action, *id.* at 724-25. And in *Reitman v. Mulkey,* 387 U.S. 369 (1967), the fact that California's voters had added to its Constitution a provision that "expressly authorized and constitutionalized" the private "right" to discriminate was

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[25]Records which banks would ordinarily make or keep in their voluntary business practice, or according to a valid order of an agency entitled to regulate banks, made for the purpose of regulating banks, are unaffected by the agency doctrine.

[26]*Cf. United States v. United Mine Workers,* 330 U.S. 258, 284-88 (1947), in which coal mine workers were found "employees" of the government within the meaning of an exception to the anti-injunction rule of the Norris-La Guardia Act where the government had seized the coal mines pursuant to the War Labor Disputes Act and had required the miners to work without striking or face civil and criminal sanctions.

held to support the California Supreme Court's conclusion that the section "would encourage and significantly involve" the state in discrimination and therefore result in sufficient state action to make constitutional guarantees applicable. *Id.* at 376.

Wherever in those cases this Court has even considered the significance of governmental coercion, it has always said that coercion would clearly make the action of otherwise private parties state action. In *Adickes v. Kress & Co.,* 398 U.S. 144 (1970), Mr. Justice Harlan said for the Court that:

> . . . settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements.
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> *Id.* at 168.

Compulsory rules of behavior were found to be the equivalent of legislative command—and to be clearly state action—in *Lombard v. Louisiana,* 373 U.S. 267, 273 (1963), in which nominally private action was held "coerced by the city"; and in *Peterson v. City of Greenville,* 373 U.S. 244 (1963), the Court was unanimous in finding state action in "private" discrimination because the actors "did precisely what the city law required," *id.* at 248. Rejecting out of hand the contention that the store would have discriminated anyway, the Court said:

> When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the dis-

> crimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.
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> *Ibid.*

Thus the closer to coercion state involvement has been, the clearer state action has been to this Court. Here coercion is simple and obvious: those required to record and report may either do so or go to jail. It would be indeed anomalous if this Court were to find governmental encouragement and joint participation sufficient to apply the Bill of Rights but exonerate the government from involvement in acts it orders to be done on pain of criminal prosecution.

The consequence of the conclusion that banks and others are agents of government when they make or keep records they would not make or keep but for the Act is that the validity of the search and seizure must be measured as of the time of making or copying—not as of the time an employee of government arrives with a warrant, subpoena, summons, or "informal request" to see the records. The recordkeeping requirements of the Act are therefore void under the Fourth Amendment for precisely the same reasons the reporting requirements are void—because the searches and seizures are accomplished without warrant or judicial supervision, are wholly unreasonable in scope, and ignore probable cause and any other standard of materiality or relevancy.

III.

THE FOURTH AMENDMENT'S GUARANTEE OF FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES AND THE FIFTH AMENDMENT'S GUARANTEE OF FREEDOM FROM COMPELLED SELF-INCRIMINATION CONVERGE TO PROHIBIT THE COERCED CREATION, RETENTION, AND DELIVERY TO THE GOVERNMENT OF INCRIMINATING EVIDENCE.

The "historic interests of 'self-protection' jointly protected by the Fourth and Fifth Amendments," *Camara v. Municipal Court,* 387 U.S. 523, 530 (1967), were so central to the drafting of those Amendments that for seventy-five years no Congress attempted by statute to compel from a criminal defendant documents that would aid in his conviction. *Boyd v. United States,* 116 U.S. 616, 622-23 (1886); see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43-47, 83-103 (1970 ed.). The Federal Judiciary Act of 1789 limited the authority of federal courts to compel the production of books and writings to instances where the discovery would not "tend to convict the party of a crime or to forfeit his property." *Boyd, supra,* at 631. The first statutes attempting such seizures, enacted in 1863 and 1874, were struck down in *Boyd, supra,* both as compelled self-incrimination and as vehicles of unreasonable searches and seizures. Pursuant to that authority, courts have consistently invalidated searches aimed at coercing incriminating documents from those sought to be incriminated. See, *e.g., Hill v. Philpott,* 445 F.2d 144 (7th Cir. 1971); *VonderAhe v. Howland,* ..... F.2d ..... (9th Cir. No. 71-1982, March 26, 1973).[27]

[27]One of this Court's more notable applications of the rule, *Gouled v. United States,* 255 U.S. 297, 310-11 (1921), has since

In its famous explication of the sense in which the Fourth and Fifth Amendments "run almost into each other," 116 U.S. at 630, the *Boyd* Court said, at pp. 630, 633-35:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.
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> * * * *
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> We have already noted the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from com-

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been partially overruled. *Warden v. Hayden*, 387 U.S. 294 (1967). But *Warden* leaves intact the *Gouled* ruling insofar as it pertains to evidence by which self-incrimination may be compelled; the *Warden* Court carefully distinguished self-incriminating evidence from the sort of non-testimonial evidence before it (trousers, a jacket and a cap), and declined to reach issues posed by evidence affecting the self-incrimination clause. 387 U.S. at 302-03.

pelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.

* * * *

. . . [W]e are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as beforesaid, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed.

Appellants do not believe that every transaction required to be reported or recorded by the Act, or even a tiny fraction of those transactions, will evidence criminality. The government apparently does; the legislative history indicates that Congress apparently did. If the government and Congress are right, then the reports that they compel constitute self-incrimination prohibited by the Fifth Amendment.

In *United States v. Sullivan*, 274 U.S. 259 (1927), the Court held that the self-incrimination clause of the Fifth Amendment did not excuse total failure to complete an income tax return. The purpose of the required information in *Sullivan* was essentially noncriminal, and the information was necessary to the fulfillment of that purpose. Much the same was said recently by the majority of this Court in *California v. Byers*, 402 U.S. 422, 431 (1971), when it sustained California's hit-and-run reporting statute because "the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment."

In *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), *Haynes v. United States*, 390 U.S. 85 (1968), and *Albertson v. SACB*, 382 U.S. 70 (1965), the Court found the self-incrimination clause a bar to the use of evidence obtained, as in *Marchetti*, *Grosso*, and *Haynes*, or to the reporting itself, as in *Albertson*. *California v. Byers*, *supra*, summarizes the factors separating the two lines of cases by saying that those in which the privilege was found applicable involved reporting requirements directed at highly selective groups inherently suspect of criminal activities, and in areas permeated with criminal statutes—not in essentially noncriminal and regulatory areas of inquiry. 402 U.S. at 430.[28]

It was clearly the empirical assumption of Congress that those who engage in the transactions required to

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[28] As *Marchetti*, *Grosso*, and *Haynes* make clear, the "required records" doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948), has no application here. See discussion *supra* at p. 32, n. 16.

be reported and recorded are a highly select and inherently suspect group. See legislative history discussed *supra* at pp. 19-27. The group was intended by Congress to be even more select and suspect through the liberal use of the broad exemptive powers of the Secretary to exclude "legitimate" business entirely from the requirements of the Act. See *supra* at pp. 23-24. The area addressed by Congress, then, is certainly permeated with criminal statutes, and the purpose of the Act can hardly be said to be non-criminal. The required reports and records are, therefore, compelled self-incrimination within the meaning of *Marchetti, Grosso,* and *Haynes,* all *supra.*[20]

Assertions of the privilege against self-incrimination normally await the attempted use of incriminating information against the party from whom it was compelled, see, *e.g., Marchetti, Grosso,* and *Haynes, supra,* or prosecution for refusal to supply the information, see, *e.g., Byers, supra.* Relying on that fact, the government has argued in its consolidated appeal (Jurisdictional Statement at 24) that appellants' self-incrimination claims are not ripe for decision and must await "an action to compel" appellants to report. What form the government thinks that action might take is unclear. But for several reasons appellants believe that this is not a normal case, and that their

[20]Appellants recognize that a telling argument can be made for the proposition that only an infinitesimal amount of the data required to be reported and recorded will actually incriminate anyone. Appellants make that argument themselves. But appellants doubt that the government will make it, for it only underscores the absurd scope of the searches and seizures mandated by the Act; the argument escapes the Fifth Amendment only to retreat into the prohibited areas of the Fourth.

arguments concerning self-incrimination are ripe for decision now. Indeed, if those claims are not adjudicated now they probably never will be.

First, the rule that the assertion of the privilege against self-incrimination must await a criminal prosecution in which the compelled evidence is offered or a prosecution for failure to produce it is not a rigid and unvarying rule; this Court wisely relaxed it, in circumstances very similar to these, in *Albertson v. SACB,* in which the Court said, 382 U.S. at 75-76:

> Specific orders requiring petitioners to register have been issued. The Attorney General has promulgated regulations requiring that registration shall be accomplished on Form IS-52a and that the accompanying registration statement shall be a completed Form IS-52 . . . and petitioners risk very heavy penalties if they fail to register by completing and filing these forms . . each day of failure to register constitutes a separate offense punishable by a fine of up to $10,000 or imprisonment of up to five years, or both. Petitioners must either register without a decision on the merits of their privilege claims, or fail to register and risk onerous and rapidly mounting penalties while awaiting the Government's pleasure whether to initiate a prosecution against them. To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so.

These appellants are in much the same position. The statute and regulations command them to report, on forms already prescribed for that purpose; they risk extremely serious civil and criminal sanctions for failing to do so; there is no question whether they will be required to report. Compare *Communist Party v. SACB,* 367 U.S. 1 (1961).

Second, the reporting and recordkeeping requirements of the Act, taken together, enable the government to undermine the protections of the Fourth and Fifth Amendments by robbing the subjects of the reports and records of procedural opportunities to assert their rights. Appellant Lieberman, for example, as a person who transports monetary instruments worth more than $5,000 across the border, must report the details of his transactions, 31 U.S.C §1101, 31 C.F.R. §103.23. Appellants Lieberman, Harwood, Bruer, and Durell, as holders of financial interests in foreign bank accounts, must both report those interests, 31 U.S.C. §1121, 31 C.F.R. §103.24, and keep, make and retain records relating to those interests, 31 U.S.C. §1121, 31 C.F.R. §103.32.

Normally, the government could not successfully use the information acquired by the reports to convict appellants of crimes because of the privilege against self-incrimination. Nor could the government obtain the records from appellants, for the purpose of incriminating them, by warrant, subpoena, summons, or any other process. See *Boyd v. United States, Hill v. Philpott,* and *VonderAhe v. Howland,* all *supra.*

Nor could the government successfully convict appellants Stark and Marson, the bank customers, by the use of bank checks in their possession, not only because the checks might have been destroyed in the ordinary course of business, but also because the Fourth Amendment prohibits the compulsory production of such documents from the parties sought to be incriminated.

But none of these prosecutorial inconveniences exists under the Bank Secrecy Act, because third parties—banks and financial institutions, and all other parties to reportable transactions—are required to make and retain copies of the documentation of nearly all of these transactions. The government may, therefore, avoid compelling the information from those it seeks to incriminate by the simple expedient of compelling it from third parties. Under the rules applicable to seeking such information from third parties, the government may successfully overcome most if not all attempts by appellants to resist production and use of the information.

When documents are sought from third parties, the subject of the documents usually has no notice of that fact. No provision for notice is contained in the Act or Regulations. Nor does the third party have any adversary interest in contesting the process. These facts by themselves undermine the procedural protections of the Fourth and Fifth Amendments.

In order to be a "person aggrieved by an unlawful search and seizure" within the meaning of Rule 41(e), Federal Rules of Criminal Procedure, which governs

motions to suppress, the moving party must have been the *victim* of the illegal search; an incriminated defendant may not under federal law suppress the incriminating fruits of the unlawful search of another. See, *e.g., Alderman v. United States,* 394 U.S. 165 (1969); *Jones v. United States,* 362 U.S. 257 (1960).[30]

The possession of the records by the third party[31] also frustrates any potential claim of self-incrimination by appellants, since the government may successfully argue under *Couch v. United States,* ..... U.S. ....., 34 L.Ed.2d 548 (1973), that appellants would have no standing to intervene to protect their Fifth Amendment rights in a summons proceeding. Nor could appellants protect those rights in a subsequent prosecution because the evidence, although compelled, was not compelled *from them.*

This action, therefore, may well be the first and last chance appellants have to protect themselves against self-incrimination because, by coerced record-keeping, the government can compel incriminating evidence from others which would not exist but for the Act. If this Court sustains the Bank Secrecy Act, it will rarely see another warrant, subpoena or summons directed to a criminal suspect in a case involving

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[30]The same result would obtain in the Act's secondary civil application. See, *e.g., Donaldson v. United States,* 400 U.S. 517 (1971), finding that a taxpayer lacked standing to intervene in a proceeding on a summons issued for records in the possession of his former employer and the latter's accountant.

[31]It defies all logic to regard these records as "business records" in the ordinary sense of the term, since they are not needed or wanted by the business and but for the Act would not be made or kept.

financial dealings; it will become standard practice for the Justice Department (and the Internal Revenue Service and other regulatory agencies) to seek financial information from the unwilling third parties who are forced by the Act to be the biographers of the financial lives of others.

Finally, the security of one's papers and the privilege against self-incrimination are substantially undermined by the Bank Secrecy Act because it introduces a new element into American law—the anticipatory, coerced creation of documentary evidence of crime. This Court is familiar with fishing expeditions for evidence of crime, but it has not yet faced a governmental attempt to stock the pond.

Subject only to a few well-established exceptions, each person retains the right to decide whether to create a paper and whether to retain it. Recordkeeping and retention may be required by specific statutes and regulations serving a specific regulatory scheme,[32] but that is not the case here. Documents already in existence may be required to be retained pursuant to specific statutes prohibiting the destruction of evidence,[33] but that is not the case here because (1) only a tiny fraction of the records required will ever be evidence of anything, and (2) it is impossible to conceptualize the "destruction of evidence" useful in a proceeding not yet conceived by anyone. Short of such

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[32]See, *e.g.*, 26 U.S.C. §6001, which authorizes the Secretary to require the making and retention of such records as he "deems sufficient to show whether or not such person is liable for tax under this title."

[33]See, *e.g.*, 18 U.S.C. §2232, authorizing criminal punishment for the destruction of property to prevent its seizure.

specific statutory restrictions, however, a person may choose not to create or retain a document at his will.

That freedom—that choice—is abolished by the Bank Secrecy Act, which, for the first time in American law, coerces citizens into creating, retaining, and transmitting to the government information intended to incriminate themselves and others. We submit that no person is "secure" in his "papers" when he is forced to create papers for the purpose of incriminating himself or others, and that no person is protected against self-incrimination when he is forced to report and record documentary facts that may send him to jail—documentary facts that would otherwise not exist.

This Court should forthrightly rule that the combined protections of the Fourth and Fifth Amendments prohibit government from forcing its citizens to create evidence for use against themselves and their fellow citizens. It may be that " 'the public . . . has a right to every man's evidence' " *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), if he *has* it, but it is a long and dangerous step from there to the notion that the public has a right to force every man to *create* it.

IV.

THE RECORDKEEPING AND REPORTING PROVISIONS OF THE ACT AND REGULATIONS VIOLATE THE APPELLANT ACLU'S RIGHTS, AND ITS MEMBERS' RIGHTS, TO FREE SPEECH, FREE ASSOCIATION, PETITION FOR REDRESS OF GRIEVANCES, AND ANONYMITY GUARANTEED BY THE FIRST AMENDMENT.

The appellant American Civil Liberties Union of Northern California, Inc., pleaded and proved without contradiction in the District Court that it is a non-profit membership corporation regarded by many as controversial, that it receives dues largely in the form of checks from all over America and from foreign countries, and that it and its members desire, because of historical retaliation[34] and fear of future retaliation, to maintain the identities of its members and contributors in strict confidence (App. 33-34; 52-53; 64, 68-69.

The long and distinguished line of decisions of this Court upholding against governmental intrusion the anonymity of members of and contributors to controversial associations is well known and well settled, and needs no extended discussion here. See *Lamont v. Postmaster General,* 381 U.S. 301 (1965); *Gibson v. Florida Legislative Investigations Comm.,* 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP,* 366 U.S. 293 (1961); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Bates v. Little Rock,* 361 U.S. 516 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); *United States v. Rumley,* 345 U.S. 41 (1953).

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[34]See, *e.g., Shelton v. Tucker, supra,* at 486 n. 7, in which members of the ACLU were among the targets of retaliation from those seeking their identities.

The technique of examining bank accounts for law enforcement purposes is neither novel nor rare. See, *e.g., Brex v. Smith, supra.* An example particularly telling here is *Pollard v. Roberts,* 283 F.Supp. 248 (E.D.Ark. 1968), *aff'd per curiam,* 393 U.S. 14, in which a District Attorney subpoenaed the records of a checking account maintained by the Arkansas Republican Party. A three-judge District Court (consisting of then Circuit Judge Blackmun, Judge Henley and Judge Harris) unanimously enjoined enforcement of the subpoenas, holding that the disclosure of membership that the investigation would entail would jeopardize the group's members and violate the First Amendment right to associational privacy. See 283 F.Supp. at 251-52, 257, 258.

A most recent example is *United States Servicemen's Fund v. Eastland,* and related cases, Numbers 71-2034, 71-1609, 71-1693, and 71-1717, decided on August 30, 1973, by the District of Columbia Circuit. In those cases the Senate Committee on Internal Security had subpoenaed the bank records of the United States Servicemen's Fund, the Progressive Labor Party, the National Peace Action Coalition, and the People's Coalition for Peace and Justice. The Court of Appeal reversed the dismissal of a complaint seeking declaratory and injunctive relief against the release of the records, holding that the plaintiffs had adequately pleaded and proved intrusion into the anonymity of their members and contributors and the consequent loss of revenue, members and confidence that resulted. While recognizing that ordinarily equitable relief would be unavailable against the subpoe-

nas, the Court of Appeal held it available in the special circumstances of a subpoena directed to a disinterested third party. Noting, Slip Opinion at 17 n.3, that the appellants based "their entire right to equitable intervention of the district court on the *fact that the subpoena was served on a disinterested third party* who cannot be expected to test out the legality of the subpoena . . ." (emphasis in original), the Court distinguished its earlier cases and held equitable relief appropriate because:

> *Here the plaintiffs have no alternative means to vindicate their rights.* They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.
>
> Slip Op. 15 (emphasis in original).

Save for the fact that no summons or subpoena has yet issued for the accounts of the appellant ACLU—to its knowledge—the appellant is in precisely the same position as the organizations granted relief in *United States Servicemen's Fund.* It cannot contest a subpoena directed to its bank, and cannot force its bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid it in protecting the anonymity of its members.

The fact that a subpoena has not yet issued should not be determinative. First, the appellant will have no way of knowing about the issuance of a subpoena; no law compels its bank to inform it, and this Court

may judicially know that it is frequent practice for banks to comply with such subpoenas or summons immediately, without resistance, and without notifying its customer. Second, even without a subpoena, the recordkeeping requirements of the Act amount to the making of a membership list of the appellant—one available not only through process but also under the regrettably widespread practice that permits informal access—i.e., without process—by law enforcement officials to bank records.[35] Thus the records of membership in and contribution to appellant ACLU are not only vulnerable to future process, they are vulnerable both to present process unknown to it and informal access unknown to it. The controversy is thus ripe for adjudication, and appellant ACLU's bank accounts deserving of this Court's protection under the First Amendment.

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[35]The day-to-day practice of permitting "informal" access to bank records is, unfortunately, widespread, notwithstanding the fact that most banks formally prohibit it. *American Banker*, May 12, 1972, p. 1, cols. 3-4. It has been reported that the identity of Daniel Ellsberg's psychiatrist was first learned by means of the examination of Ellsberg's bank checks—an examination that, according to a pending indictment in the Superior Court in Los Angeles, led to the subsequent burglary of the psychiatrist's office by former high government officials. *New York Times*, pp. 1, 21, cols. 7-8. This Court may judicially notice the contents of affidavits on file in *American Civil Liberties Union, et al. v. Shultz, et el.*, No. 1330-72, now pending in the United States District Court for the District of Columbia. Those affidavits indicate frequent extralegal examination of bank records for unlawful political purposes.

CONCLUSION

Mr. Justice Jackson, dissenting in *Shapiro v. United States,* 335 U.S. 1, 71 (1948), foresaw legislation like the Bank Secrecy Act:

> It would, no doubt, simplify enforcement of all criminal laws if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today . . . invites and facilitates that eventuality.

Mr. Justice Jackson did not foresee the possibility that one day we would be required not only to keep diaries of our own activities, but also to keep biographies of the activities of others, in order to "simplify enforcement of all criminal laws." The Bank Secrecy Act realizes a major part of this nightmare.

This Court recently said, in *Almeida-Sanchez v. United States,* ___ U.S. ___, 37 L.Ed.2d 596, 603 (1973):

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

The Bank Secrecy Act does not even pay lip service to constitutional safeguards. Its goal is mass, anticipatory incrimination; its method is mass, indiscriminate search and seizure. Both goal and method are

repugnant to the Constitution; appellants ask that they be invalidated by this Court.

November 22, 1973.

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(Appendices A and B Follow)

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Appendix A

12 U.S.C. § 1829b.

§ 1829b. *Retention of records by insured banks—Congressional findings and declaration of purpose*

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal tax, or regulatory investigations or proceedings.

Rules and Regulations

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

Identity of persons having accounts and persons authorized to act with respect to such accounts; exemptions

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

Reproduction of checks, drafts, and other instruments; records of transactions; identity of party

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

Identity of persons making transactions reportable under the Currency and Foreign Transactions Reporting Act

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

Additions to or substitutes for required records

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

Retention period

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

Report to Congress by Secretary of the Treasury

(h) The Secretary shall include in his annual report to the Congress information on his implementa-

tion of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

Sept. 21, 1950, c. 967, § 2[21], as added Oct. 26, 1970, Pub.L. 91-508, Title I, § 101, 84 Stat. 1114.

U.S.C. § 1951-1959.

§ 1951. *Congressional findings and declaration of purpose*

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 1953(b) of this title have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 1952 of this title may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Pub.L. 91-508, Title I, § 121, Oct. 26, 1970, 84 Stat. 1116.

§ 1952. *Reports on ownership and control*

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured

institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

Pub.L. 91-508, Title I, § 122, Oct. 26, 1970, 84 Stat. 1116.

§ 1953. *Recordkeeping and Procedures*

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) of this section, any records or evidence of any type which the Secretary is authorized under section 1829b of this title to require insured banks to require, retain or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under

this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

Pub.L. 91-508, Title I, § 123, Oct. 26, 1970, 84 Stat. 1116.

§ 1954. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or

practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

Pub.L. 91-508, Title I, § 124, Oct. 26, 1970, 84 Stat. 1117.

§ 1955. *Civil penalties*

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title I, § 125, Oct. 26, 1970, 84 Stat. 1117.

§ 1956. *Criminal penalty*

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Pub.L. 91-508, Title I, § 126, Oct. 26, 1970, 84 Stat. 1118.

§ 1957. *Additional criminal penalty in certain cases*

Whoever willfully violates any regulation under this chapter, section 1829b of this title, or section 1730d of this title, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title I, § 127, Oct. 26, 1970, 84 Stat. 1118.

§ 1958. *Compliance*

The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and sections 1730d and 1829b of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

Pub.L. 91-508, Title I, § 128, Oct. 26, 1970, 84 Stat. 1118.

§ 1959. *Administrative procedure*

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 1829b of this title, and section 1730d of this title.

Pub.L. 91-508, Title I, § 129, Oct. 26, 1970, 84 Stat. 1118.

§ 1051. *Congressional declaration of purpose*

It is the purpose of this chapter to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Pub.L. 91-508, Title II, § 202, Oct. 26, 1970, 84 Stat. 1118.

§ 1052. *Definitions and rules of construction*

(a) The definitions and rules of construction set forth in this section apply for the purposes of this chapter.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this chapter generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 1813 of Title 12;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 1724 of Title 12;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;

(14) a dealer in precious metals, stones, or jewels;

(15) a pawnbroker;

(16) a loan or finance company;

(17) a travel agency;

(18) a licensed transmitter of funds;

(19) a telegraph company;

(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or

(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this chapter to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this chapter or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5.

(k) For the purposes of section 1001 of Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this chapter to which the regulation relates.

Pub.L. 91-508, Title II, § 203, Oct. 26, 1970, 84 Stat. 1118.

§ 1053. *Regulations*

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this chapter.

Pub.L. 91-508, Title II, § 204, Oct. 26, 1970, 84 Stat. 1120.

§ 1054. *Compliance*

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this chapter. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

Pub.L. 91-508, Title II, § 205, Oct. 26, 1970, 84 Stat. 1120.

§ 1055. *Exemptions*

The Secretary may make such exemptions from any requirement otherwise imposed under this chapter as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the

parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

Pub.L. 91-508, Title II, § 206, Oct. 26, 1970, 84 Stat. 1120.

§ 1056. *Civil penalty*

(a) For each willful violation of this chapter, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this chapter, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub.L. 91-508, Title II, § 207, Oct. 26, 1970, 84 Stat. 1120.

§ 1057. *Injunctions*

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this chapter, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper

showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this chapter or any order of the Secretary made in pursuance thereof.

Pub.L. 91-508, Title II, § 208, Oct. 26, 1970, 84 Stat. 1120.

§ 1058. *Criminal penalty*

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Pub.L. 91-508, Title II, § 209, Oct. 26, 1970, 84 Stat. 1121.

§ 1059. *Additional criminal penalty in certain cases*

Whoever willfully violates any provision of this chapter where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title II, § 210, Oct. 26, 1970, 84 Stat. 1121.

§ 1060. *Immunity of witnesses*

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this chapter before or ancillary to—

(1) a court or grand jury of the United States

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Pub.L. 91-508, Title II, § 211, Oct. 26, 1970, 84 Stat. 1121.

§1061. *Availability of information to other Federal agencies*

The Secretary shall, upon such conditions and pursuant to such procedures as he may by regulation prescribe, make any information set forth in reports filed pursuant to this chapter available for a purpose consistent with the provisions of this chapter to any

other department or agency of the Federal Government on the request of the head of such department or agency.

Pub.L. 91-508, Title II, § 212, Oct. 26, 1970, 84 Stat. 1121.

§ 1062. *Administrative procedure*

Subject to section 1052(j) of this title, the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5, shall apply to all proceedings under this chapter.

Pub.L. 91-508, Title II, § 213, Oct. 26, 1970, 84 Stat. 1121.

Subchapter II.—Domestic Currency Transactions

§ 1081. *Reports*

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Pub.L. 91-508, Title II, § 221, Oct. 26, 1970, 84 Stat. 1122.

§ 1082. *Persons required to file reports*

The report of any transaction required to be reported under this subchapter shall be signed or other-

wise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

Pub.L. 91-508, Title II, § 222, Oct. 26, 1970, 84 Stat. 1122.

§ 1083. *Reporting procedure*

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this subchapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this chapter, or section 1730d or 1829b of Title 12.

(b) Any person (other than an institution designated under subsection (a) of this section) required to file a report under this subchapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except that (1) if the institution is not designated under subsection (a) of this section, the report shall be filed as the Secretary shall prescribe, and (2) any such person

may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) of this section shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Pub.L. 91-508, Title II, § 223, Oct. 26, 1970, 84 Stat. 1122.

Subchapter III.—Reports of Exports and Imports of Monetary Instruments

§ 1101. *Reports—Persons required to file*

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place with the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed reports

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

Common carriers

(c) Subsection (a) of this section does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

Pub.L. 91-508, Title II, § 231, Oct. 26, 1970, 84 Stat. 1122.

§ 1102. *Forfeiture*

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

Pub.L. 91-508, Title II, § 232, Oct. 26, 1970, 84 Stat. 1123.

§ 1103. *Civil liability*

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 1101 of this title, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this subchapter are in addition to any other liabilities, civil or criminal, except that

the liability under this section shall be reduced by any amount actually forfeited under section 1102 of this title.

Pub.L. 91-508, Title II, § 233, Oct. 26, 1970, 84 Stat. 1123.

§ 1104. *Remission of forfeiture or penalty*

The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just.

Pub.L. 91-508, Title II, § 234, Oct. 26, 1970, 84 Stat. 1123.

§ 1105. *Enforcement authority*

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 1101 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.
Pub.L. 91-508, Title II, § 235, Oct. 26, 1970, 84 Stat. 1123.

§ 1121. *Records and reports*

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpoena or summons duly authorized and issued or as may otherwise be required by law.

Pub.L. 91-508, Title II, § 241, Oct. 26, 1970, 84 Stat. 1124.

§1122. *Classifications and requirements*

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 1121 of this title.

(2) The foreign country or countries as to which any requirement imposed under section 1121 of this title applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 1121 of this title.

(4) Types of transactions subject to or exempt from any requirement imposed under section 1121 of this title.

(5) Such other matters as he may deem necessary to the application of this subchapter.

Pub.L. 91-508, Title II, § 242, Oct. 26, 1970, 84 Stat. 1124.

Appendix B

31 C.F.R. § 103

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 *Meaning of Terms*

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer

in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 *Determination by the Secretary*

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22. *Reports of Currency Transactions*

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 *Report of Transportation of Currency or Monetary Instruments*

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency

or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 *Reports of Foreign Financial Accounts*

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 *Filing of Reports*

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23 (a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not

accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23 (b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 *Identification Required*

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer

identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 *Determination by the Secretary*

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 *Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts*

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept

at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 *Records to be Made and Retained by Financial Institutions*

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature of purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regard-

ing a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 *Additional Records to be Made and Retained by Banks*

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks

per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted under subparagraph (b)(3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts, or transfers of credit, of more than $10,000 received directly

and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 *Additional Records to be Made and Retained by Brokers and Dealers in Securities*

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3 (a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

§ 103.36 *Nature of Records and Retention Period*

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains

only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34 (b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 *Person Outside the United States*

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a

transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 *Dollars as Including Foreign Currency*

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42. *Photographic or Other Reproductions of Government Obligations*

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 *Availability of Information*

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or

regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

§ 103.44 *Disclosure*

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 *Exceptions, Exemptions, Modifications, and Reports*

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable to the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 *Enforcement*

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48.

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports

shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 *Civil Penalty*

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 *Forfeiture of Currency or Monetary Instruments*

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 *Criminal Penalty*

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 *Enforcement Authority with respect to Transportation of Currency or Monetary Instruments*

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more dsignated or described places, or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 *Effective Date*

This part shall become effective July 1, 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1073

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

THE CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (App. 75-93) is reported at 347 F. Supp. 1242.

JURISDICTION

The order of the three-judge district court, which declared Sections 221-223 of Chapter 2 of Title II of the Act of October 26, 1970, 84 Stat. 1114, 1118 (hereafter the Bank Secrecy Act)[1] to be unconstitutional

[1] The Act of October 26, 1970, *supra*, has no official title but is popularly known as the Bank Secrecy Act. Title II of the Act is officially entitled the Currency and Foreign Transactions Reporting Act (Section 201).

and which preliminarily enjoined the enforcement of these Sections and regulations promulgated thereunder by the Secretary of the Treasury (31 C.F.R., Part 103, Subparts B and D), was entered on October 18, 1972 (App. 94–95). Notices of appeal were filed by the defendants on November 13, 1972 (App. 98–99), and probable jurisdiction was noted on October 9, 1973 (App. 104). The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether it was proper for the court below to entertain a facial challenge to the constitutionality of Sections 221–223 of the Bank Secrecy Act, at the behest of private parties who failed to allege or show that these Sections, as applied, violated their Fourth Amendment or other rights.

2. Whether Sections 221–223 of the Bank Secrecy Act, as implemented by Treasury Regulations[2] requiring financial institutions to file reports with the Secretary of the Treasury concerning currency transactions involving more than $10,000, except routine transactions by established customers, violate the Fourth Amendment or other constitutional provisions.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Bank Secrecy Act (Sections 101, 102, 121–129, 201–213, 221–223, 231–235, 241 and 242, 12 U.S.C. 1829b, 1951–1959; 31 U.S.C. 1051–1062, 1081–1083, 1101–1105, 1121–1122) and the Regulations thereunder (31 C.F.R. 103.11, 103.21–

[2] 31 C.F.R. 103.22. See Treasury Regulations on Financial Recordkeeping and Reporting of Currency and Foreign Transactions (31 C.F.R.) Part 103 (37 Fed. Reg. 6912).

103.26, 103.31–103.37 and 103.41–103.50), together with Section 5(b) of the Trading With the Enemy Act, 40 Stat. 415, as amended (12 U.S.C. (1940 ed., Supp. V) 95a), are set forth at pp. 69–130 of the Appendix to the Jurisdictional Statement. Section 251 of the Revised Statutes (31 U.S.C. 427) and pertinent Regulations issued under the Trading With the Enemy Act (31 C.F.R. 102.1–102.4) are set forth in App., *infra*, pp. 43–44.

STATEMENT

This is an appeal from an order of a three-judge district court holding Sections 221–223 of the Bank Secrecy Act (84 Stat. 1114, 1118) to be facially "repugnant to Amendment IV of the Constitution" (App. 94) and enjoining their enforcement and the enforcement of regulations promulgated thereunder by the Secretary of the Treasury (31 C.F.R., Part 103, subparts B and D).[3]

A. THE BANK SECRECY ACT: A BRIEF OVERVIEW

The Bank Secrecy Act was enacted in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers engaged in illegal activities. The Act was designed to reduce white collar crime by making such records more accessible to law enforcement officials. In order to obtain maximum specificity and flexibility, the Act authorizes the Secretary of the Treasury to prescribe

[3] In No. 72–985 and No. 72–1196 the plaintiffs have appealed from that portion of the district court's decision upholding the constitutionality of the remainder of the Act. The government's brief in those cases, which are consolidated for argument with the present case, will be filed separately.

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certain bank recordkeeping and reporting requirements; pursuant to this statutory authority, the Secretary has promulgated specific implementing Regulations. The Act and Regulations are designed to obtain financial information having a "high degree of usefulness in criminal, tax or regulatory investigations or proceedings" (H. Rep. No. 91–975, 91st Cong., 2d Sess., p. 10) through three main provisions.

First, Title I of the Act and the implementing Regulations require financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments, and to keep records of certain other items. The provisions give government agencies no additional access to such records, which may be obtained only through the usual subpoena or summons procedures.

Second, Section 231 of Title II and the applicable Regulations require reports of transportations of currency into or out of the country, except nonphysical transportations through normal banking channels. In addition, Section 241 of Title II and the Regulations require individuals with bank accounts or other relationships with foreign banks to provide limited information on a tax return form.

Third, Section 221 of Title II, which along with two related sections (Sections 222–223) was the only part of the Act held unconstitutional, grants to the Secretary of the Treasury the authority to require reports of "[t]ransactions involving any domestic financial institution * * * if they involve the payment, receipt or transfer of United States Currency, or such other monetary instruments as the Secretary may specify,

in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe". These reports may be required from the domestic financial institution involved or the parties to transactions (Section 222), and the Secretary may also designate certain financial institutions to receive the reports (Section 223). Under the Regulations promulgated by the Secretary, however, only financial institutions must file reports with the Internal Revenue Service and they must do so only where the transaction involves the deposit, withdrawal, exchange or other payment of *currency* in excess of $10,000. 31 C.F.R. 103.22 (a). The Regulations exempt several types of currency transactions from the reporting requirement, the most important of which are transactions "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned." 31 C.F.R. 103.22(b).

B. THE COMPLAINANTS

1. The California Bankers Association is an association of 158 state and national banks doing business in California (App. 9). The complaint filed by the Association did not allege that any provision of the Bank Secrecy Act violated any Fourth Amendment right of *its members* against unreasonable searches and seizures, nor did it specifically challenge the Regulations promulgated by the Secretary of the Treasury which required its member banks to file reports involving currency transactions or payment of currency in ex-

cess of $10,000. The only regulation the Association challenged was 31 C.F.R. 103.45(a), since modified, under which the Secretary of the Treasury reserved the right to alter the regulations which he had promulgated. This discretionary power, the Association alleged, "threatens to deprive members of their constitutional right of due process and equal protection under the Fifth Amendment * * * and is a void delegation of legislative power and/or an excessive exercise of legislative power previously delegated * * *" (App. 12).

2. A second complaint was filed on behalf of a number of separate plaintiffs including (to the extent here relevant) the Security National Bank, its president and customer Fortney Stark, Jr.; a customer of another bank, one Charles Marson; and the American Civil Liberties Union of California. These plaintiffs, like the California Bankers Association, did not specifically allege that the regulation requiring banks to report currency transactions in excess of $10,000 violated any Fourth Amendment rights which they enjoyed.

a. The claim of the individual plaintiffs regarding Sections 221–223 of Title II was that, given the broad provisions in Title I which require extensive recordkeeping, the authority delegated to the Secretary in Title II to compel disclosure of information by the banks (allegedly including copies of all personal checks drawn by depositors) could be exercised in a manner which would violate their right "to be free from unreasonable searches and seizures under the Fourth Amendment" and also cause them to suffer a "chilling effect upon their right of association as

guaranteed by the First Amendment * * * and an abridgment of their constitutional right of privacy" (App. 69, 70).

b. The American Civil Liberties Union, which alleged generally that if the Act and Regulations are permitted to come into effect it "will no longer be able to reasonably and effectively maintain the anonymity of its members and contributors" (App. 68), did not make any Fourth Amendment claim nor did it state how the provisions of Title II as applied here could have the effect it alleged.

c. The Security National Bank likewise made no allegation that any provision of the Bank Secrecy Act or the Regulations violated any Fourth Amendment right to which it was entitled nor did it claim that any of its constitutional rights were violated (App. 68).

C. THE DECISION BELOW

The district court unanimously upheld the constitutionality of the recordkeeping requirements of Title I and the accompanying Regulations (App. 75–82), and the requirements of Title II and the Regulations requiring reports concerning the import and export of currency and monetary instruments and relationships with foreign financial institutions (App. 77–79). Although thus upholding the provisions dealing with foreign financial transactions, the court concluded, with one judge dissenting (App. 93), that the domestic currency transaction reporting provisions of Sections 221–223 are on their face "repugnant to Amendment IV of the Constitution" (App. 94). In the court's view, these provisions could authorize—

although the Regulations do not do so—the Secretary to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts (App. 80), and could conceivably be administered in such a way as to compel disclosure of "details of [a customer's] personal financial affairs not shown on either the bank's own records or on the face of the customer's checks" (App. 86). The court for this reason enjoined enforcement of these provisions by implementation of the Regulations issued thereunder or otherwise without ruling on the question whether the Regulations themselves violate the Fourth Amendment or any other constitutional provision (App. 94–95).

ARGUMENT

I. INTRODUCTION AND SUMMARY

The Bank Secrecy Act was enacted by Congress in 1970 following extensive hearings on the widespread use by United States citizens and residents of foreign bank accounts in bank secrecy jurisdictions for the purpose of concealing violations of United States laws or the fruits of such violations and on the failure of some domestic financial institutions to maintain adequate records of checking account transactions and the identity of the customers.[4] See, general-

[4] Included among the varied illicit uses of secret foreign bank accounts found by Congress were illegal trading in gold, manipulation of United States securities markets, violation of the Securities and Exchange Commission rules on "insider trading," evasion of federal income taxes (for example, by concealing realization of gain on sales of securities held through foreign banks), and concealing funds generated from illegal gambling and narcotics operations. See S. Rep. No. 91-1139, *supra*, pp.

ly, Hearings before the House Committee on Banking and Currency on Foreign Bank Secrecy and Bank Records, 91st Cong., 1st and 2d Sess. (hereafter House Hearings), and Hearings before the Senate Subcommittee on Financial Institutions of the Committee on Banking and Currency on Foreign Bank Secrecy, 91st Cong., 2d Sess. (hereafter Senate Hearings). The purpose of the legislation, as indicated by the Senate Committee Report, (S. Rep. No. 91–1139, 91st Cong., 2d Sess., p. 1) is "to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." See also H. Rep. No. 91–975, *supra*, p. 10.

While the overall purpose of both Titles I and II of the Act is thus the same, Title I generally deals with recordkeeping and Title II generally deals with reporting.

(i) Title I of the Act authorizes the Secretary of the Treasury to require domestic banks and other domestic financial institutions to maintain records which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (Sections 101, 121). Pursuant to this and somewhat more specific authorizations contained in Title I,[5] the Secretary has prescribed Regulations requiring banks insured under the Federal Deposit Insurance Act to maintain records and other evidence of the identities of their customers, to make microfilm copies of checks

3–4. Another area of concern was the use of foreign banks to circumvent margin requirements on the purchase of United States securities. S. Rep. No. 91–1139, *supra*, pp. 9–10. Title III of the Act, which deals with this specific problem, was not challenged in these suits.

[5] See Sections 101, 102, 123.

and similar instruments that are drawn on them and presented for payment, and to keep records of items which they receive for deposit or collection. 31 C.F.R. 103.34. The Regulations also require other financial institutions to maintain certain records pertaining to their customers and their accounts. 31 C.F.R. 103.33. However, there is no provision in Title I or elsewhere giving the government additional authority to inspect such records, and the amended Regulations expressly provide that such inspection is governed by other federal law. The court below upheld the constitutionality of these Title I recordkeeping provisions, and they are not involved in this appeal by the Secretary of the Treasury and the other defendants, although they are challenged by the plaintiffs in No. 72–985 and No. 72–1196.

(ii) Title II also has the same declared purpose of requiring records and reports which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (Section 202). The approach is somewhat different, however, since it is largely aimed at transactions with foreign financial institutions which are not subject to the regulatory power of Congress. S. Rep. No. 91–1139, *supra,* pp. 3, 4. Section 241 gives the Secretary of the Treasury authority to require United States citizens, residents and businessmen who have bank accounts or other relationships with foreign financial institutions to maintain records and file reports regarding these relationships. Under the Regulations, such persons must report information concerning their accounts in foreign

financial institutions on their tax returns and an accompanying form (31 C.F.R. 103.24).

Section 231 of the Act requires the reporting of each transportation into or out of the United States of monetary instruments exceeding $5,000 in value on any one occasion.[4] The Regulations, however, exempt from the Section 231 reporting requirement each "transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments * * *" (31 C.F.R. 103.23(a)). The district court upheld the constitutionality of the provisions relating to reports of foreign bank accounts and imports and exports of monetary instruments (App. 77–79) and they are also not involved in the government's appeal.

(iii) The domestic currency transaction reporting provisions of Title II, which were struck down by the district court, are probably the least innovative features of the Bank Secrecy Act. Since 1945, financial institutions had been providing reports of their customers' large currency transactions, pursuant to regulations promulgated by the Secretary of the

[4] Section 231(a)(2) also requires a report where a person "receives monetary instruments [exceeding $5,000 in value] at the termination of their transportation to the United States from or through any place outside the United States." Section 203(*l*) defines the term "monetary instruments" to include "coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates."

Treasury under Section 5(b) of the Trading With the Enemy Act (J.S. App. 89–91) and Section 251 of the Revised Statutes (App., *infra,* p. 44). These regulations required financial institutions to report all currency transactions that, in the judgment of the institution, exceeded those "commensurate with the [legitimate and] customary conduct of the business, industry or profession of the person or organization concerned" (31 C.F.R. 102.1). Mentioned particularly were transactions involving $1,000 or more in denominations of $50 or more,[7] or $10,000 or more in any denominations.[8] 31 C.F.R. (1949 ed.), Part 102 (10 Fed. Reg. 6556, App., *infra,* pp. 43–44. When these Regulations were revised in 1959, the Secretary noted the great value of these reports in disclosing income tax evasion by racketeers, narcotics dealers, foreign agents, and others engaged in illegal activities. In the fiscal years 1957 and 1958, for example, the Internal Revenue Service completed 129 fraud cases, involving additional tax and penalties of approximately $13,500,000, that originated from information contained in the TCR–1 currency reports. Treasury Release No. A–590, *supra.*

By 1970, the use of financial institutions, both domestic and foreign, in furtherance of criminal activities had markedly increased. H. Rep. No. 91–975, *supra,* p. 10; S. Rep. No. 91–1139, *supra,* pp. 2–3. Congress recognized the importance of reports of

[7] The amount was raised in 1952 to $2,500 in denominations of $100 or more. 17 Fed. Reg. 1822; 17 Fed. Reg. 2306.

[8] In 1959, the reporting form was simplified. Treasury Release No. A–590, August 3, 1959 (J.S. App. 127–129).

large and unusual currency transactions in discovering criminal activity and desired to strengthen the statutory basis for requiring such reports. H. Rep. No. 91–975, *supra,* pp. 11–12. In particular, Congress intended to authorize more definite standards for determining what constitutes the type of unusual transaction that should be reported. S. Rep. No. 91–1139, *supra,* p. 6; House Hearings, *supra,* p. 61.

In the statute as enacted, Congress determined to delegate to the Secretary the authority for specifying the currency transactions which should be reported. Section 221 provides:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 222 provides that the Secretary may require such reports from the domestic financial institution involved or the parties to the transactions, or both, and Section 223 authorizes the Secretary to designate financial institutions to receive such reports.

In his implementing Regulations, the Secretary made almost no use of the last two statutory authorizations, requiring only that *financial institutions* file the reports with the Commissioner of Internal Rev-

enue. The new Regulations are considerably more definite in scope, but not significantly broader than the repealed former Regulations.[9] They require that all deposits, withdrawals, exchanges, payments or transfers of currency [10] must be reported by the financial institution involved, except "transactions with an established customer maintaining a deposit relationship * * * in amounts * * * commensurate with the customary conduct of the business, industry or profession of the customer concerned." [11] 31 C.F.R. 103.22(*b*).

The form prescribed by the new currency transaction reporting regulations requires much the same severely limited information as did the old Form TCR–1, J.S. App. 130. The present Form 4789, J.S. App. 121, requests only (1) the name, address, busi-

[9] Instructions Relating to Reports of Currency Transactions, 31 C.F.R., Part 102, repealed effective July 1, 1972.

[10] The term "currency" is narrowly defined in the instructions accompanying Form 4789 and Section 103.11 of the Regulations to mean "The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It * * * does not include bank checks or other negotiable instruments not customarily accepted as money."

[11] The Regulations also provide that the names of all customers whose currency transactions in excess of $10,000 are not reported on Form 4789 must be reported to the Treasury on demand. Transactions with Federal Reserve Banks or Federal Home Loan Banks, or solely with or originated by financial institutions or foreign banks, are also excluded from these reporting requirements. Section 103.22. In addition, the Secretary may exempt in writing other transactions from the reporting requirements. Section 103.45 of the Regulations. As was the case under the old Regulations (31 C.F.R. 102.3), the new Regulations require that the financial institutions obtain identification from persons making transactions which must be reported (31 C.F.R. 103.26).

ness or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted, (3) a summary description of the nature of the transaction, the type, amount and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented, and (5) the identity of the reporting financial institution.

While the regulations formulated by the Secretary pursuant to Sections 221–223 were thus very narrow, the district court proceeded to consider the constitutionality of the Act on its face and without regard to either the intention of Congress as to the manner in which the Act should be applied or the manner in which the Secretary had exercised his authority under the Act. The district court recognized that, if the Bank Secrecy Act authorized the adoption of regulations which compelled the production by banks of their "own records pertaining to the customer's financial transactions," the bank customers would "have no recognizable right to claim invasion of their privacy * * *" (App. 84). Although the only substantive regulation adopted by the Secretary which compelled disclosure by banks—the $10,000 currency transactions regulation—involved little more than submission of information from the banks' own records pertaining to the customers' financial transactions, the court struck down the provisions of Title II which authorized that regulation, as well as two related provisions, because these provisions allegedly could be administered in such a

way as to compel disclosure from a bank customer of details of every financial transaction he engages in by check.

The approach to Sections 221–223 taken by the district court is contrary to fundamental principles of constitutional adjudication which require that the constitutionality of statutes be determined not on the basis of speculation as to how they could conceivably be applied but on the manner in which they are actually being applied by those charged with their administration. This error was compounded by failure of the district court to examine the legislative history of the Bank Secrecy Act to determine whether a construction of Sections 221–223, consistent with both the intent of Congress and the Constitution, was possible. Moreover, the district court ignored the equally well established principle that the judicial power to determine the validity of executive or legislative action may be invoked only by persons in immediate danger of sustaining a direct injury as a result of that action.

Had the district court followed these basic principles, it would necessarily have concluded that Sections 221–223, as applied in accordance with the intent of Congress, do not violate the Fourth Amendment, and that the plaintiffs, who did not challenge the constitutionality of Sections 221–223 as applied or allege that they were in immediate danger of sustaining any direct injury as a result of the regulations adopted by the Secretary, were not entitled to the injunctive relief issued here.

The legislative history of Title II of the Bank Secrecy Act reveals, as its language indicates, that it was not intended to authorize the Secretary of the Treasury to require reports from bank customers of their ordinary personal checking transactions. The Secretary was authorized, instead, to require reports of unusual transactions involving currency or bearer instruments.

The Secretary's regulations require only that reports be filed by banking institutions (not bank customers) regarding *currency* transactions which are in excess of $10,000 and which do not involve "transactions with an established customer maintaining a deposit relationship * * * in amounts * * * commensurate with the customary conduct of the business industry or profession of the customer concerned." 31 C.F.R. 103.22(b).

Under the district court's own reasoning, these regulations as applied were not invalid under the Fourth Amendment (even assuming a properly framed complaint by legally aggrieved parties), nor do they pose an unreasonable burden on banking institutions. As the district court correctly held (App. 84), it is settled law:

> that communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers

> have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under subpoena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination.

Moreover, experience under similar regulations adopted pursuant to the Trading with the Enemy Act, as well as other evidence presented to Congress in support of the present Act, show that the Act and Regulations are reasonably related to the power of Congress to enact legislation to facilitate enforcement of federal criminal, tax and regulatory laws. The provisions here in question were enacted specifically for the purpose of providing "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." S. Rep. No. 91–1139, *supra,* p. 1. There can be little doubt that the domestic currency reporting provisions authorized by Title II and provided for by the Regulations are eminently useful for this purpose. The focus of these provisions is, of course, transactions involving unusual transfers of large sums of money. Evidence before Congress demonstrated that criminal activities frequently require large amounts of cash or result in the generation of large amounts of cash, that such activities can often be successful only if the necessary cash can be concealed, and that eventually the cash must be transformed into various forms of credit in order to be fully useful. The hearings on the Act also disclosed that domestic and foreign financial in-

stitutions were often used—sometimes unwittingly—as instruments for handling the large amounts of cash needed to facilitate complex criminal schemes. Congress had the power to adopt reasonable regulations intended to prevent banking institutions from thus becoming unwitting accomplices in illegal criminal enterprises.

II. THE DISTRICT COURT IMPROPERLY IGNORED THE ACTUAL CURRENCY REPORTING REGULATIONS AND ADJUDGED SECTIONS 221–223 UNCONSTITUTIONAL ON THE BASIS OF THE CONJECTURAL OUTER LIMITS OF HYPOTHETICAL REGULATIONS

In considering the provisions of the Act concerning domestic financial transactions, the district court entirely disregarded the Secretary's implementing Regulations, which set forth the reporting requirements under these statutory provisions. Although the Regulations require only financial institutions to report transactions (31 C.F.R. 103.22(a)), the district court analyzed the statutes involved as if reporting were required "by other parties to or participants in transactions with the institutions" (App. 80). Although under the Regulations the transactions that financial institutions must report are only those involving "currency," as distinguished from checks and drafts or other written orders (31 C.F.R. 103.11), the court analyzed these statutory provisions as if reporting were required "not only of currency transactions but of any transaction involving any monetary instrument" (App. 80). And, although the Regulations direct financial institutions to report only cur-

rency transactions involving more than $10,000 (31 C.F.R. 103.22(a)), the court below considered the statutory provisions as if there were a requirement to report all transactions "in any amount—large or small" (App. 80).

Thus, instead of adjudging the constitutionality of a statutory scheme, as implemented by regulations, that requires only financial institutions to report only certain currency transactions involving more than $10,000 (which is all that is actually in effect), the court undertook to decide the constitutionality of requiring financial institutions and all parties and participants in domestic transactions with these institutions to make reports of all such transactions, regardless of the monetary instrument or amount of money involved (App. 85). Indeed, the court went so far as to declare unconstitutional Section 223, which permits the Secretary to authorize banks to act as recipients of reports, even though the Regulations do not in any way implement this provision and it cannot now be known how, if at all, it will ever be implemented. The court broadly enjoined the Secretary and other defendants from enforcing or implementing Sections 221–223 of the Act, either pursuant to existing Treasury Regulations or pursuant to any broader or narrower Regulations which might be issued in the future (App. 95).

Assuming *arguendo* that Sections 221–223 could properly be given the broad interpretation postulated by the majority below, the court's method of constitutional adjudication seriously contravenes fundamental

principles long applied by this Court. Most importantly, this Court has often held that the constitutionality of Acts of Congress should not be decided on the basis of how such statutes might hypothetically be administered, but rather on the basis of how they are actually enforced by the appropriate executive officials. See, *e.g., Poe* v. *Ullman,* 367 U.S. 497; *Electric Bond Co.* v. *Securities and Exchange Commission,* 303 U.S. 419, 443. As the Court held in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324, the power of adjudication extends only so far as there is "action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." Again, in *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 71–72, the same principle was expressed in somewhat broader terms:

> Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. * * * No rule of practice * * * is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it." * * * In part, this principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations. * * * In part it represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet pro-

ceeded so far as to affect individual interests adversely.

Moreover, it is an equally well "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action * * *." *Ex parte Levitt*, 302 U.S. 633, 634; *Laird* v. *Tatum*, 408 U.S. 1, 13.

These basic rules of constitutional adjudication were reiterated only last Term in *Broadrick* v. *Oklahoma*, No. 71–1639, decided June 25, 1973, where persons who were concededly engaged in conduct subject to state regulation challenged the Oklahoma "little Hatch Act" on the ground that it might be applied to restrain conduct which is constitutionally protected.[12] The Court responded as follows (slip op. 9):

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. * * * A closely related principle is that constitutional rights are

[12] The Court has, of course, struck down statutes on occasion on grounds of "facial overbreadth," but, as noted in *Broadrick* (slip op. 10–14) this "exception to our traditional rules of practice" (*id.* at 14) applies only in narrow circumstances when the mere existence of an overly broad statute by itself has a chilling effect on free speech. And even in those cases the doctrine of "facial overbreadth" has been "employed by the Court sparingly and only as a last resort" (*id.* at 12).

> personal and may not be asserted vicariously. * * * These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris*, 401 U.S. 37, 52 (1971).

The district court here failed entirely to heed these rules in striking down Sections 221–223 as facially "repugnant" to the Fourth Amendment. Although these statutory provisions are not self-executing and merely authorize the Secretary of the Treasury to prescribe regulations requiring reports of transactions involving specified currency and monetary transfers, the court proceeded to render an essentially advisory opinion—at the behest of persons who failed to show that they have sustained or are in imminent danger of sustaining any direct injury as a result of the actual operation of the Act.

Since there are present none of the "weighty countervailing policies" (*United States* v. *Raines*, 362 U.S. 17, 22–23) which warrant such extraordinary relief in First Amendment cases (see *Broadrick* v. *Oklahoma*, *supra*, slip op. 10), and since there would be ample time for any aggrieved party to invoke the judicial power if and when the Secretary promulgated any regulation which violated the Constitution, it was entirely improper for the district court to entertain and decide a facial challenge to the constitutionality of the Bank Secrecy Act.

III. HAVING IMPROPERLY UNDERTAKEN TO RESOLVE THE CONSTITUTIONAL QUESTIONS ON THE BASIS OF "FACIAL OVERBREADTH," THE DISTRICT COURT COMPOUNDED ITS ERROR BY ADOPTING AN OVERLY BROAD CONSTRUCTION OF THE STATUTE

Even if it were assumed, *arguendo,* that the questions raised by the plaintiffs below as to the constitutionality of Sections 221–223 should have been decided on the basis of how the statute might hypothetically be applied, the district court's decision is nevertheless fundamentally erroneous. Where, as here, the validity of an Act of Congress is drawn in question and a serious doubt as to its validity is raised, "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62; see *United States* v. *Rumely,* 345 U.S. 41, 45–46; *Schneider* v. *Smith,* 390 U.S. 17, 26–27. Accordingly, this Court held last Term that the doctrine of facial overbreadth is not to be "invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick* v. *Oklahoma, supra,* slip op. 12. And in placing such a limiting construction on the Hatch Act, the Court stated: "As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *United States Civil Service Commission* v. *National Association of Letter Carriers,* No. 72–634, decided June 25, 1973 (slip op. 22).

Totally ignoring this well-established principle, the district court took precisely the opposite approach—*i.e.*, it based its finding of constitutionally impermissible overbreadth on its own unnecessarily broad reading of the statutory language as permitting the Secretary to make demands for detailed reports of all domestic financial transactions, including copies of personal checks. Indeed, a narrower construction of the statute here is not only possible, it is all but compelled by both the language and the legislative history of the provisions in question.

Nothing in the language of Sections 221–223 purports to give the Secretary any specific power to demand reports of all domestic financial transactions, including personal checks. As the headings of Title II of the Act, Chapter 2 of Title II, and Section 221 themselves suggest, the focus of this reporting requirement is on *currency* transactions. Specifically, the statute authorizes the imposition of a reporting requirement only in the case of transactions involving the "payment, receipt or transfer of United States currency, or such other monetary instruments as the Secretary may specify." The term "monetary instruments" is not an open-ended term encompassing any financial instrument, but is specifically defined by Section 203(*l*) as encompassing only

> * * * coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof,

as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

The legislative history indicates that the "monetary instruments" Congress had in mind were currency and "near currency"—*i.e.*, instruments which are capable of being used as the equivalent of currency in order to transfer credit without leaving any record or trace as to the transaction or the identity of the participants. The bill as introduced applied (in both its domestic currency transaction and foreign currency transportation provisions) only to United States currency, but its application was expanded at the behest of the Department of the Treasury in order "to close a potential loophole through which reporting requirements could be avoided by not using U.S. currency but rather its equivalent." Senate Hearings, *supra*, p. 183; see House Hearings, *supra*, pp. 151, 152. The modifications proposed by the House Committee on Banking and Currency included a definition of the term "monetary instruments" which is broader than that eventually adopted in Section 203. That definition would have made the provisions applicable to transactions involving foreign and United States coin and currency and "such types of checks, bills, notes, bonds, stock transferable by delivery, or other obligations or instruments as the Secretary may by regulation specify." H. Rep. No. 91-975, *supra*, p. 5. In discussing this change, the Committee noted that the definition might theoretically reach as far as personal checks, but it cautioned that "It is not the intention of your committee * * * that this broadened authority

be expanded any further than necessary to cover those types of bearer instruments which may *substitute for currency.*" H. Rep. No. 91-975, *supra,* p. 22 (emphasis added).

The further modifications reflected in the final legislation were again suggested by the Department of the Treasury for the express purpose of providing a more restrictive definition in line with this express intent of the House Committee. Congress deleted "checks" from the definition of monetary instruments and indicated its desire to cover only certain specified bearer instruments (travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery) or *"their equivalent thereof* as the Secretary may by regulation specify for the purpose of the provision of this title [Section 221] to which the regulation relates [emphasis added]." The reference to the "equivalent" of the specified bearer instruments was plainly intended only to authorize the Secretary of the Treasury to include other instruments, which might be devised to avoid the reporting requirements, that would be negotiable "without leaving a record of the chain of ownership." Senate Hearings, *supra,* p. 183.

Thus, the legislative history shows a congressional intent to prevent circumvention of the *currency* reporting requirements through the use of instruments which are the equivalent of currency. As to the use of personal checks as a means of transferring credit, Congress was content to rely on the recordkeeping provisions of Title I under which banks would be required to retain microfilm copies and records of their

deposit and collection.[13] In sum, though Congress gave the Secretary a measure of discretion in determining the precise scope of the domestic currency and near-currency transaction reporting requirement, it clearly did not envision a reporting requirement differing in kind from that imposed under the pre-existing Treasury Regulations issued under Revised Statutes, Section 251, and the Trading with the Enemy Act. The district court therefore erred in analyzing the constitutionality of the statute on the basis of the kind of intrusion into personal financial affairs which would occur if the Secretary were to require routine disclosure of *all* information shown on the face of *all* personal checks. Congress intended that access to such items, which are the specific subject of the recordkeeping requirements of Title I, would continue to be governed by established legal process, and that the new legislation would not authorize unlimited fishing expeditions into the affairs of bank customers. See S. Rep. No. 91-1139, *supra*, p. 5. The hypothetical application of the statute feared by plaintiffs and the district court is not authorized by the statute; any attempt to impose such a pervasive financial transaction reporting requirement (and there is no reason to predict that any such attempt will occur) would be subject to challenge,

[13] This, of course, does not foreclose the possibility that bank checks or drafts might be drawn and used in such a way, for example, as to enable large amounts of credit to be transferred abroad without leaving any trace of the transactions involved, or that the Secretary might properly determine that such instruments constitute "monetary instruments" for the purpose of some or all of the provisions of Title II. However, routine personal checks which are not drawn or used in such a way seem clearly beyond the scope of the Title II reporting requirements.

not on constitutional grounds (which need not be reached), but on the ground that such a requirement exceeded the Secretary's statutory authority.[14]

IV. AS APPLIED BY THE SECRETARY OF THE TREASURY, SECTIONS 221–222 OF THE BANK SECRECY ACT ARE CONSTITUTIONAL

1. The regulations adopted by the Secretary of the Treasury pursuant to Sections 221 and 222 [15] do not violate the Fourth Amendment or infringe on any other constitutional right of the plaintiffs. We have shown in the Statement, *supra,* that none of the plaintiffs specifically alleged in the complaints that the regulation which requires reports of currency transactions in excess of $10,000 violated the Fourth Amendment or that it even purported to authorize a "search or seizure" within the meaning of the Fourth Amendment.[16] Moreover, even under the rationale of

[14] The application here of the foregoing established principles of constitutional adjudication makes it unnecessary to consider whether Sections 221–223 are facially repugnant to the Fourth Amendment. We submit, however, that, whatever other claims may be asserted by either the banks or bank customers, the delegation to the Secretary of the Treasury of authority to compel disclosure of information relating to transactions involving currency or specified bearer transactions—or their equivalent—does not constitute a search or seizure, much less an unreasonable search or seizure.

[15] As previously noted (*supra*, p. 20), the other provision struck down by the court below, Section 223, is not self-executing and has not been implemented by any regulation adopted by the Secretary.

[16] Plaintiffs and the district court recognized the limited scope of the $10,000 domestic currency reporting regulation, but contended that under Section 103.45 the Secretary may impose additional reporting requirements by means of a simple

the district court, it is plain that, as applied by the Secretary, the $10,000 currency regulation does not impinge upon any Fourth Amendment right of bank customers. The court below recognized that "bank customers have no recognizable right to claim invasion of their privacy merely because a government agency, by summons or subpoena, requires a bank to produce the bank's own records pertaining to the customer's financial transactions" (App. 84). But, the court reasoned, "a bank customer reasonably expects privacy concerning details of his personal financial affairs not shown on either the bank's own records or on the face of the customer's checks and which must be disclosed only by the report required of the bank customer, himself, as a party to or participant in a financial transac-

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written order. Initially, the principle limiting constitutional challenges to statutes as actually implemented and narrowly construed precludes consideration of this contention here, since no written order expanding the currency reporting provisions has ever been issued. It is true that Section 103.45 as originally promulgated provided that the Secretary could by written order or authorization make exceptions to, grant exemptions from, expand by additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part.

The "additional * * * requirements" provision was merely intended to allow the Secretary in appropriate cases to substitute one type of compliance for another—for example, to require lists of currency transactions rather than individual reports. It was never intended that this authority would be used to expand the substantive scope of the Regulations without following the notice and hearing provisions of the Administrative Procedure Act. In any event, if the offending phrase was too broad, the proper response of the court below was to strike it, not to declare the three statutes unconstitutional. Moreover, the question is now moot, since the offending phrase has been deleted from the regulation.

tion" (App. 86). And it was only as to this possible application of the Act that the Fourth Amendment guarantees were held to be applicable.

The Bank Secrecy Act, as applied by the Secretary of the Treasury, however, requires only reports by banks (not bank customers), involving only information from "the bank's own records." Since the Act as construed and applied by the Secretary does not even involve reports regarding "customer's checks" or that any information be supplied by the customer at all, under the rationale of the district court the Act as applied (which is all the court should have addressed) is not invalid under the Fourth Amendment.

2. Largely ignoring the omissions in their complaints and the reasoning of the district court, the California Bankers Association argued in its motion to affirm (pp. 9–10):[17]

> The Bank Secrecy Act and regulations would, at this writing, compel banks and other financial institutions to report, automatically, all domestic currency transactions involving $10,000 or more. If, as we believe, a bank customer expects privacy when he initiates a $10,000 domestic currency transaction, he would seem to be entitled to the protection of the Fourth and Fifth Amendment. But even if we reject an assumption of privacy in bank-customer relations, the Act's automatic reporting provisions are singularly unreasonable. There is simply no certain or even probable connection

[17] The other plaintiffs filed no response to the jurisdictional statement.

between a $10,000 domestic currency transaction and the commission of a crime.

a. The assertion that the $10,000 currency regulation violates the Fourth Amendment rights of bank customers who engage in transactions subject to the reporting requirements prescribed by the Secretary is premature and without substance.

We first reemphasize here the "established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action * * *." *Ex parte Levitt,* 302 U.S. 633, 634; *Laird* v. *Tatum,* 408 U.S. 1, 13. The bank customer plaintiffs here [18] made no allegation that they have in the past engaged in the unusual type of transaction subject to the regulations' reporting requirements or that they would be likely to engage in such action in the future. They have, therefore, failed to make any showing that they are "immediately in danger of sustaining a direct injury as the result of that action * * *." [19]

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[18] The California Bankers Association, of course, has no standing to assert claims vicariously on behalf of bank customers.

[19] By contrast, in challenging the regulations requiring reports of certain foreign monetary transactions, the individual plaintiffs alleged that they each "maintain a financial interest in and signature authority over one or more bank accounts in foreign countries" (App. 65), or that the complainant has "repeatedly in the recent past transported, mailed or shipped * * * one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States and expects to have reason to do so again in the near future" (App. 64–65).

Moreover, even a bank customer who could establish standing to challenge the regulations could not successfully maintain that requiring disclosure by the bank of information necessarily disclosed by him to the bank during a commercial banking transaction constitutes a search or seizure of him or of his possessions. Since the information comes from the bank's own records, no seizure of any tangible or intangible property of the bank customer is involved.

While it was held in *Katz* v. *United States,* 389 U.S. 347, that the electronic interception of verbal conversations comes within the Fourth Amendment's proscription against unreasonable searches and seizures, it has never been suggested that the disclosure of the contents or of the nature of a conversation by one party constitutes an unreasonable search or seizure of the other party. A party to a private telephone conversation may have a reasonable expectation that the conversation will not be electronically intercepted without his knowledge by law enforcement officers, but he cannot rely for exclusionary purposes on any expectation that the other party to the conversation will not disclose the contents of the conversation (see *United States* v. *White,* 401 U.S. 745) or, in the absence of privilege, that the other party will not be compelled to do so pursuant to a grand jury subpoena or other lawful process. As the Court held in *Branzburg* v. *Hayes,* 408 U.S. 665, 682:

> Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen

from disclosing to a grand jury information that he has received in confidence.

Any such expectation of privacy would be particularly unreasonable here, where the transactions at issue are with institutions subject to a panoply of regulatory statutes which involve extensive recordkeeping and reporting requirements. See, *e.g.*, *Donaldson* v. *United States*, 400 U.S. 517, 522; *Harris* v. *United States*, 413 F. 2d 316 (C.A. 9); *Galbraith* v. *United States*, 387 F. 2d 617 (C.A. 10); *United States* v. *Cleveland Trust Co.*, 474 F. 2d 1234 (C.A. 6); *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F. 2d 326, 332 (C.A. 2).

b. Similar considerations require rejection of the purported Fifth Amendment claim asserted on behalf of the bank customers. The regulations clearly do not compel any of the plaintiffs or any bank customer to supply any information or incriminatory evidence. As the Court held in *Couch* v. *United States*, 409 U.S. 322, 328:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man * * *

> to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him*," *Holt* v. *United States*, 218 U.S. 245, 252–253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice."

c. The claim that the $10,000 currency transaction reporting requirement is "singularly unreasonable" is also without substance.

The manner in which the California Bankers Association has framed its challenge to the regulation evidences its recognition that the Fourth Amendment, "if applicable" at all here, protects only against unreasonable demands for disclosure of records. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208. As the Court held in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652:

> [C]orporations can claim no equality with individuals in the enjoyment of a right of privacy. * * * They are endowed with public attributes.

---

[20] The Fifth Amendment claim is also premature. The individual appellants who claim to be affected by the operation of Title II made no allegation in their complaint that compliance with the Act would require them to incriminate themselves and none of the other complainants raised such a claim. "The privilege against self-incrimination is one which normally must be claimed [only] by the individual who seeks to avail himself of its protection." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107. Moreover, even if the reports were required of the customers of financial institutions, which is not the case, they could properly assert their Fifth Amendment claim only in an action to compel them to make a report, not in a declaratory judgment action such as this. *Haynes* v. *United States*, 390 U.S. 85, 99; *Bowes* v. *Commission to Investigate Allegations of Police*, 330 F. Supp. 262 (S.D. N.Y.).

> They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.

In any event, as Judge Learned Hand held for the court in *McMann* v. *Securities and Exchange Commission,* 87 F. 2d 377, 379 (C.A. 2), the Fourth Amendment does not forbid the government from requiring information on individual accounts from financial institutions—here the currency reports—unless the demand "is out of proportion to the end sought." Accord: *Shapiro* v. *United States,* 335 U.S. 1, 32–33.

No reason is suggested why the limited requirements at issue here are not a reasonable exercise of the power of Congress to assure that the channels of interstate commerce are employed in a manner which will facilitate rather than jeopardize or hinder enforcement of the law, and of its power to enact laws necessary and proper for the enforcement of federal criminal, tax and regulatory laws. Indeed, the need for precisely the kind of disclosure requirements at issue here was strongly indicated in the course of the Bank Secrecy Act's extensive legislative history.[21]

---

[21] It has not been suggested that the reporting requirement places an undue burden on the banks. While the district court enjoined the enforcement of Sections 222–223 of the Bank Secrecy Act, experience under the Trading with the Enemy Act, in the last seven years prior to the adoption of the Bank Secrecy Act, indicated that an average total of fewer than 20,000 covered transactions were reported annually by all banking institutions in the United States.

The provisions here in question were enacted specifically for the purpose of providing "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." S. Rep. No. 91-1139, *supra*, p. 1. There can be little doubt that the domestic currency reporting provisions authorized by Title II and provided for by the Regulations are eminently useful for this purpose. The focus of these provisions is, of course, transactions involving unusual transfers of large sums of money. The testimony before Congress of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice indicated that criminal activities frequently require large amounts of cash or result in the generation of large amounts of cash, that such activities can often be successful only if the necessary cash can be concealed, and that eventually the cash must be transformed into various forms of credit in order to be fully useful. See Senate Hearings, *supra*, p. 65. The hearings also disclosed that domestic and foreign financial institutions were often used—sometimes unwittingly—as instruments for handling the large amounts of cash needed to facilitate complex criminal schemes. See, *e.g.*, House Hearings, *supra*, pp. 25–26, 66–67, 68, 91. For example, in numerous instances domestic banks were used by non-customers for the purpose of transferring cash to secret foreign accounts used to evade United States tax and securities laws. Indeed, former United States Attorney Robert Morgenthau estimated that hundreds of millions of dollars of United States funds were deposited in secret foreign accounts for illegal purposes. House Hearings, *supra*, p. 91. Such testi-

mony formed the basis of an express finding by the House Committee that (H. Rep. No. 91-975, *supra*, p. 11):

> Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials.[22]

The utility of such a currency transaction reporting requirement was not merely a matter of expert opinion, but was affirmatively established by the experience under the requirements imposed since 1945 under the authority of the Trading With the Enemy Act. In 1959, the Treasury Department noted the valuable assistance such reports had provided in tax evasion cases. It was indicated that the Internal Revenue Service had completed 129 cases in 1957 and 1958 alone, involving additional tax and penalties of approximately $13,500,000, which were originated from information received pursuant to such reporting requirements. Treas. Release No. A-590, J.S. App. 127-129.

Of course, not every bank transaction involving cash—nor even every bank transaction involving large amounts of cash—involves questionable activity. And

[22] Measures designed to control currency transactions are the subject of further proposed legislation pending before the present Congress. For example, at least four bills are pending which would limit cash contributions to political campaigns and/or cash expenditures by candidates. S. 1936, 93d Cong., 1st Sess., S. 2086, 93d Cong., 1st Sess.; H.R. 10048, 93d Cong., 1st Sess.; H.R. 10463, 93d Cong., 1st Sess.

the regulations accordingly do not require reporting in the case of every cash transaction or even every large transaction. Instead, what is reached is every large currency transaction (over $10,000) which might be deemed unusual under the circumstances—*i.e.*, transactions by persons having no established customer relationship with the bank, or transactions by established customers in an amount unusually large for such persons. Thus, the requirement is not unduly broad, but is narrowly directed to the category of transactions that is most likely to be indicative of questionable activity. Indeed, it is difficult to see how the requirement could be drawn any more narrowly unless the burden of reporting were defined in terms of actual suspicion on the part of bank officials as to the legitimacy of the transaction. While overtly suspicious transactions might well be reported in any event, it is not ordinarily the province of bank officials to inquire as to the purpose of their customers' bank transactions; the legislation and regulations, accordingly, were intended to remove the subjective element as much as possible from the reporting requirement and to establish more definite standards for determining the type of unusual transactions to be reported. See S. Rep. No. 91-1139, *supra*, p. 6.

Moreover, the utility of the reporting provisions becomes even more apparent when they are viewed in context as a part of the entire Bank Secrecy Act. Title I requires financial institutions to maintain records so that they will be available for subpoena or summons by law enforcement officials. But the effectiveness of these provisions, which the district court upheld (App. 76-77), depends on whether those engaging in illegal

activities use written instruments such as checks and on whether the investigatory agencies know of the financial institutions with which they deal. Reports by financial institutions of large currency transactions by nonestablished customers prevent underworld figures from evading the effect of the Title I record-keeping provisions and supply leads for determining which records should be summoned or subpoenaed.

The currency reporting provisions also increase the effectiveness of the Title II provisions requiring reports of persons who transfer currency in excess of $5,000 into or out of the country, or who maintain relationships with foreign financial institutions. See 31 C.F.R. 103.23, 103.24, J.S. App. 96–98.

Although the covert physical transportation of currency into or out of the United States constitutes a key element in effecting the conversion of cash into usable credit, there was considerable testimony before the congressional committees that domestic financial institutions are also often unknowingly involved in transfers and transactions designed to accomplish one step or another in more sophisticated and complex conversion procedures. See, *e.g.*, House Hearings, *supra*, pp. 25–26, 66–67, 68, 90–91; Senate Hearings, *supra*, pp. 280–281. To the extent that large domestic currency transactions, which often mark the beginning or end of these conversion procedures, are not reported and remain secret, the foreign currency reporting provisions become easier to circumvent.

Accordingly, we submit that Sections 221–223 as applied are reasonably related to a legitimate congressional purpose and do not impose an unreasonable burden on the banks.

d. The First Amendment claim raised by the American Civil Liberties Union complaint, and not considered below, appears to have been based largely on the overly broad reading of the statute erroneously adopted by the district court rather than the requirements actually imposed by the Regulations. Relying on cases such as *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, the ACLU contended that the reporting requirement, if extended to personal checks, would disclose membership of and contributions to controversial organizations, thereby chilling the exercise of the First Amendment right of free association.[23] But, as we pointed out above, pp. 25–28, the reporting requirement actually imposed by the Regulations does not extend to personal checks or the like, and it is extremely doubtful that the statute could properly be construed as authorizing the Secretary to require reports of such items. And even if it could be assumed that the American Civil Liberties Union or its members and contributors regularly engage in the currency transactions made reportable under the Act, there is no basis for believing that the reports would be used to suppress the organization or its members or that they would result in public disclosure of protected associational relationships. The possible chilling effect on First Amendment rights is thus so remote as to be virtually nonexistent, at least under the domestic currency transaction reporting provisions of the statute as now administered. Here, as in *Laird* v. *Tatum,* 408 U.S. 1, mere allegations of a subjective chilling of

[23] See ACLU Plaintiffs' Memorandum of Points and Authorities re: Temporary Restraining Order, pp. 44–51.

First Amendment rights do not give rise to a justiciable issue "absent actual present or immediately threatened injury resulting from unlawful governmental action." 408 U.S. at 15.

CONCLUSION

For the reasons stated, the judgment of the district could should be reversed insofar as it grants injunctive relief with respect to the enforcement or implementation of Sections 221–223 of the Act.

Respectfully submitted.

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NOVEMBER 1973.

APPENDIX

31 C.F.R., Part 102

PART 102—INSTRUCTIONS RELATING TO REPORTS OF CURRENCY TRANSACTIONS

§ 102.1 *Reports of currency transactions required.*

Commencing with transactions occurring in the month of August 1959, every financial institution in the United States shall file monthly reports on Form TCR–1 concerning each deposit or withdrawal, or other payment or transfer, effected by, through, or to such financial institution, which involves transactions in United States currency as follows:

(a) Transactions involving $2,500 or more of United States currency in denominations of $100 or higher;

(b) Transactions involving $10,000 or more of United States currency in any denominations, and

(c) Transactions involving any amount in any denominations,

which in the judgment of the financial institution exceed those commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.

§ 102.2 *Filing of reports.*

Reports on Form TCR–1 shall be filed on or before the 15th day of the month following that in which the reported transactions occur, with the Federal Reserve Bank of the district in which the reporting financial institution is located. All information called for in

such form shall be furnished. A supply of Form TCR–1 may be obtained upon request directed to any Federal Reserve Bank.

§ 102.3 *Identification required.*

No financial institution shall effect any transaction with respect to which a report is required unless the person or organizations with whom such transaction is to be effected has been satisfactorily identified.

§ 102.4 *Definitions.*

As used in this part "payment or transfer" shall include exchange of currency; and "financial institutions" shall mean banks, trust companies, savings banks, private bankers, investment bankers, building and loan associations, securities and commodities brokers, and currency exchanges and other persons or organizations engaged primarily in cashing checks and exchanging currency.

Revised Statutes:

Sec. 251. The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss.

[31 U.S.C. 427.]

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In the

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OCTOBER TERM, 1973

No. 72-985

CALIFORNIA BANKERS ASSOCIATION,
Appellant,

vs.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellees.

No. 72-1073

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellants,

vs.

CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., et al.,
Appellees.

No. 72-1196

FORTNEY H. STARK, JR., et al.,
Appellants,

vs.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellees.

On Appeals from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEE
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Appellees.

On Appeals from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEE

California Bankers Association

INTRODUCTION

In October, 1970, Congress enacted legislation that has come to be known as the Bank Secrecy Act.[1]

The Act has two parts. Title I and its implementing regulations require banks and other financial institutions to copy and retain virtually every piece of paper that passes through the American banking system. Titles II and III require banks among others to report automatically certain domestic and foreign currency transactions.

These cases came to court in June, 1972, with suits by the California Bankers Association (CBA), a number of individuals, a bank, and the American Civil Liberties Union, attacking both the Act's recordkeeping and reporting requirements.

In the fall of 1972, a three-judge court filed a memorandum decision and entered an order (1) denying motions to enjoin the Act's recordkeeping provisions, but (2) granting motions to enjoin the Act's domestic reporting requirements. Both the private litigants and the government have appealed.

This brief is in response to the government's appeal, and will explain why we believe the Bank Secrecy Act's automatic reporting requirements to be in violation of the Fourth and Fifth Amendment standards established by this Court.

OPINION BELOW

The opinion of the District Court is included in the Single Appendix ("App.") at 75-93, and is reported at *Stark v. Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972).

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1. Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114, *et seq.*, (12 U.S.C. §§ 1829b, 1951-1959 and 31 U.S.C. §§ 1051-1122.)

JURISDICTION

These appeals comprise two consolidated cases.

On October 18, 1972, a three-judge court convened pursuant to 28 U.S.C. § 2282 (Act of June 25, 1948, ch. 646, 62 Stat. 968), denied motions to enjoin enforcement of the Act's recordkeeping provisions, but granted an injunction enjoining enforcement of the domestic reporting requirements. (App. 94-95).

The government filed a notice of appeal to this Court in both cases on November 13, 1972. (App. 96-99). The CBA and the various plaintiffs in the *Stark* case noticed appeals to this Court on November 16 and 17, 1972, respectively. (App. 100-103).

The jurisdiction of this Court to hear the government's appeal is based on 28 U.S.C. §§ 1252 and 1253. (Act of June 25, 1948, ch. 646, 62 Stat. 928, as amended).

QUESTIONS PRESENTED

(1) Do the mandatory reporting requirements of the Bank Secrecy Act violate Fourth Amendment search and seizure standards?

(2) Do the mandatory reporting requirements of the Bank Secrecy Act give adequate notice as required by the due process clause of the Fifth Amendment?

(3) Does Section 103.22 of the Bank Secrecy Act regulations violate the Act?

(4) Are the reporting requirements of the Bank Secrecy Act so inexorably tied to the Act's recordkeeping provision as to render both unconstitutional for the same reasons?

(5) Does the California Bankers Association have standing to assert the constitutional rights of its members and their customers in this litigation?

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the United States constitution are set forth in *Appendix A* to this brief. The Bank Secrecy Act is set forth in *Appendix B*. The Act's implementing regulations, including amendments, are set forth in *Appendix C*.

STATEMENT

Background—In December, 1969, legislation leading to enactment of the Bank Secrecy Act was introduced in the House of Representatives.[2] A short time later, similar though somewhat broader legislation was introduced in the Senate.[3]

Hearings were held in June, 1970. The legislation was actively supported by the Department of Justice.[4]

The Bank Secrecy Act, combining and modifying the Senate and House bills, was then approved by the Congress and signed into law by the President on October 26, 1970. The Secretary of the Treasury promulgated implementing regulations on March 31, 1972.

Purpose—The primary objective of the Bank Secrecy Act is the detection of crimes and the apprehension of criminals. That fact is not in dispute.

The government, for example, has said that the Act is designed "to reduce white collar crime by making [bank records] more accessible to law enforcement officials." (Govt. Brief 3). The Act is said to curtail "the use of financial institutions, both domestic and foreign, in furtherance of

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2. H.R. 15073, 91st Cong., 1st Sess. (1969).

3. S. 3678, 91st Cong., 2d Sess. (1970).

4. See generally, *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st and 2d Sess. (1970); and *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess. (1970).

criminal activities . . ." (Govt. Brief 12), and is said to be "eminently useful" in providing law enforcement authorities with evidence of white collar crimes. (Govt. Brief 18).

That the Bank Secrecy Act's primary goal is the detection of crimes and the apprehension of criminals is, in any event, apparent from the Act's legislative history.[5] The original House bill was submitted in response to an "increase in criminal activity" involving the use of financial institutions.[6] The bill's chief sponsor, Representative Patman, in debate on the House floor, said it was prompted by the belief of law enforcement officials "that an effective attack on organized crime requires the maintenance of adequate and appropriate records by financial institutions."[7]

In the Senate, the Act's purpose was said to be providing "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime."[8] The reporting requirements, in particular, were assumed to "aid law enforcement authorities to prosecute U.S. criminals,"[9] and "to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime."[10]

In summary, the primary goal of the Bank Secrecy Act is the detection of crimes and the apprehension of criminals. That fact, as we have said, is not in dispute.

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5. See generally, pages 19-27 of the Stark Brief (No. 72-1196) where the plaintiffs quote extensively from the legislative history in support of their contention that the "dominant—almost exclusive—purpose" of the Bank Secrecy Act is "to create and collect evidence of crime." *Id* at 19.

6. H.R. Rep. 91-975, 91st Cong., 1st Sess. 10 (1970). 2 U.S. Code Cong. & Admin. News 4394 (1970).

7. 116 Cong. Rec. 16950 (1970).

8. S. Rep. 91-1139, 91st Cong., 2d Sess. 1 (1970).

9. *Id.* at 7.

10. *Id.* at 1.

Nor does the Act have anything to do with the regulation of banks and other financial institutions, as such—a conclusion the government does not dispute. Indeed, no dispute is possible. The legislative history of the Bank Secrecy Act is completely devoid of any suggestion that the Act is in any way related to the regulation of America's financial institutions.

The Statutes and Regulations—The Bank Secrecy Act has two parts. Title I has been used to compel banks and other financial institutions to microfilm or otherwise copy virtually every piece of paper that passes through the American banking system. (See Sections 101 and 102 of the Act, and Section 103.34 of the Regulations.) Title II requires banks and other financial institutions to report certain domestic and foreign currency transactions. (See Sections 221 and 223 of the Act, and Sections 103.22-103.24 of the Regulations.)

The Act's recordkeeping requirements (Title I) are the subject of appeal by the various private litigants. (Nos. 72-985 and 72-1196). The government in turn has appealed the District Court's order enjoining the operation and enforcement of the Act's domestic reporting requirements. (No. 72-1073). This brief is in reply to the government's appeal.

The Act's domestic reporting requirement (Title II) are set forth in Sections 202-223. Section 202 provides that the purpose of the reporting provisions is to require reports or records having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." The Act then defines terms (Section 203); authorizes implementing regulations (Section 204); arms the Treasury Secretary with criminal and civil enforcement powers (Sections 205 and 207-11); approves dissemination of reported informa-

tion throughout the Federal bureaucracy (Section 212); and authorizes broad-scale exemptions.

> "The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review." (Section 206).

Section 221 then provides:

> "Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe."

Finally, Section 222 provides in part that the required transaction report is to be signed "or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require."[11]

The Treasury Secretary's implementing regulations begin with a finding that the reports required "have a high degree of usefulness in criminal, tax or regulatory investigations

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11. See discussion, *infra*, at 37-39.

or proceedings." (31 C.F.R. § 103.21). The reports required are those for "each deposit, withdrawal, exchange of currency or other payment or transfer . . . which involves a transaction in currency of more than $10,000." (31 C.F.R. § 103.22). An exception is made for transactions made by

> "an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him." *Id.*[12]

Section 103.24 of the Regulations requires, *inter alia,* reports from "[e]ach person subject to the jurisdiction of the United States . . . having a financial interest" in a foreign bank account. Section 103.25 specifies the form and timing of required reports; and pursuant to Section 103.26, banks and others are required to "verify and record the identity" of the person engaged in a transaction for which a report is required.[13]

The information obtained by the Treasury Secretary is to be made available "to any other department or agency of the United States" on written request. (31 C.R.F. § 103.43).[14]

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12. See discussion, *infra,* at 35-37.

13. There appears to be general agreement that the practical effect of 31 C.F.R. § 103.26 is to compel banks and others to verify —in some way—the identity of potential customers before opening an account. See, The American Bankers Association, Operational Guidelines for Compliance By Commercial Banks with the Treasury Regulations On Financial Recordkeeping and Reporting of Currency and Foreign Transactions (1972).

14. After this litigation began and the decision of the District Court was known, various sections of the regulations, including 103.43, were amended. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). The amendments, included in *Appendix C,* do not affect these consolidated appeals. Section 103.43 for example, now provides that "information made available . . . shall be received

Finally, the Secretary has assumed authority, "in his sole discretion" to "make exceptions to or grant exemptions from the requirements of" the regulations.

> "Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary."[15]

We deem it fair to say that the Bank Secrecy Act regulations—including the Act's current reporting requirements—are subject to immediate, uncontrolled, indiscriminate change. We deem it fair to say, too, that this kind of unrestrained discretion invites political and financial abuse.

The Litigation—This litigation began with a suit by a number of individuals, a bank, and the American Civil Liberties Union of Northern California. (*Stark v. Shultz*). In a separate action a short time later, the California Bankers Association joined in the attack on the Bank Secrecy Act. (*California Bankers Association v. Shultz*).

The plaintiffs in the *Stark* case are Fortney H. Stark, Jr., a bank president and customer; Security National Bank, an insured national bank; Charles C. Marson, a bank customer; the American Civil Liberties Union of Northern California, a non-profit membership corporation; Fred Lieberman, an individual expecting to export monetary instruments; Edward C. Harwood, Carl Bruer and Edward

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. . . in confidence and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought." (31 C.F.R. § 103.43 (1973)).

15. When this litigation began, Section 103.45 was even broader. See 31 C.F.R. § 103.45 in its original form, set forth in *Appendix C* at 43-44.

Durell, individuals maintaining financial interests in and signature authority over one or more bank accounts in foreign countries; and sixteen unidentified additional plaintiffs. The plaintiff in the *California Bankers Association* case is an association comprising all 158 state and national banks doing business in California.

The District Court ordered the two cases consolidated; issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions and persons;" (App. 42); and pursuant to 28 U.S.C. § 2282[16], convened a three-judge court to hear and decide the constitutional issues raised by the complaints and motions for a preliminary injunction.

The District Court Opinion—In a memorandum decision dated September 11, 1972, the District Court upheld the Bank Secrecy Act's recordkeeping and foreign transaction reporting requirements. (App. 75-79). But the District Court found the Act's domestic reporting requirements unconstitutional and, with one judge dissenting, issued a preliminary injunction. (App. 79-93, 94-95).

The District Court did not discuss plaintiffs' objections to the Act's recordkeeping requirements. The decision simply states that the court found "no constitutional violation in these record-keeping provisions, as such . . ." (App. 76-77).

Turning to the Act's reporting requirements, the District Court upheld the provisions compelling reports of exports and imports of monetary instruments. (App. 77-79). The Court noted, *inter alia*, that in the case of foreign transactions, the Act contains adequate procedural safeguards:

16. Act of June 25, 1948, c. 646, 62 Stat. 968.

"For example, with respect to enforcement of [Section 231], the Act [Section 235] provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of [Section 241] (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law." (App. 79).

There are, however, *no* such safeguards in the case of the Act's domestic reporting provisions. The question, then, in the opinion of the District Court, was whether the broad, unlimited authority of the Treasury Secretary to compel reports in financial transactions from banks, other financial institutions, and their customers without judicial intervention of any kind, "is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment." (App. 81).

The District Court noted, first, this Court's recognition of the right of privacy, and cited among other cases, *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Katz v. United States*, 389 U.S. 347 (1967). (App. 82). The District Court noted also that:

". . . communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under sub-

poena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963)." (App. 84).

The District Court observed, however, that there was no opportunity for judicial supervision or intervention in the case of the Bank Secrecy Act. (App. 85). The Act and its implementing regulations compel reports of certain domestic currency transactions whenever the reporting entity decides they have occurred.[17]

> "The Act challenged . . . makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand." (App. 86-87).

The District Court opinion concludes that the Act

> ". . . insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this

17. Determining when a proscribed transaction has occurred may be difficult. See discussion, *infra* at 35-37.

kind of legislation, as to unreasonably invade the right of privacy protected by the Bill of Rights, particularly the Fourth Amendment provision protecting 'the right of the people to be secure in the their persons, houses, papers and effects against unreasonable searches and seizures.'" (App. 91).

The Appeals—The government filed a notice of appeal to this Court on November 13, 1972, seeking review of that portion of the District Court order enjoining the operation and enforcement of the Bank Secrecy Act's domestic reporting requirements. (App. 96-99).

On November 16 and 17, 1972, respectively, the California Bankers Association, and the various plaintiffs in the *Stark* case filed notices of appeal from the District Court's refusal to enjoin the operation and enforcement of the Act's record-keeping provisions. (App. 100-103).

This Court noted probable jurisdiction on October 9, 1973, and the three appeals were consolidated for hearing. (App. 104).

SUMMARY OF ARGUMENT

(1) The reports required by the Bank Secrecy Act violate the standards this Court has established for reasonable search and seizure.

(a) The Bank Secrecy Act was designed to reduce white-collar crime. Yet the reports required by the Act require no warrant, and do not come within any of the recognized exceptions to the warrant requirement. The principles set forth in *United States v. United States District Court*, 407 U.S. 297 (1972)—including specifically a "neutral and detached magistrate"—are destroyed by the reporting requirements of the Bank Secrecy Act.

(b) Even in the case of administrative searches, this Court has required warrants whenever practicable.

Camara v. Municipal Court, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967)

(c) Even if the Bank Secrecy Act is viewed as analogous to an administrative summons, the reporting requirements violate the Fourth Amendment. The reports are not subject to judicial review or supervision, and there is no opportunity for challenge or intervention. As a result, the Act violates the standard set for administrative summonses in such cases as *United States v. Powell*, 379 U.S. 48 (1964).

(d) Finally, even if the reports required by the Act are deemed analogous to the required reports approved in such cases as *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *Yakus v. United States*, 321 U.S. 414 (1944), the Act is invalid. The Bank Secrecy Act is not related to any *specific* purpose; is not required to monitor either the reporting entity or the reporting entity's business; and is not in accord with the standards for required records set forth in such cases as *Shapiro v. United States*, 335 U.S. 1 (1948); and *Marchetti v. United States*, 390 U.S. 39 (1968).

(2) In an effort to salvage the Bank Secrecy Act's reporting requirements, the government argues that since the reports required by the Act are based on "the bank's own records, no seizure of any tangible or intangible property of the bank customer is involved." (Govt. Brief 33). The foregoing argument fails for at least two separate reasons. First, the reports required by the Act are *not* based on the banks' own records. Second, even if they were, then the Fourth Amendment operates in favor of the bank to protect those records from unlawful search and seizure.

(3) Narrow application will not salvage an invalid statute. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967).

Hence, even if one assumed a high correlation between crime and $10,000 currency transactions, the requirements of the Fourth Amendment may not be abridged in the name of effective law enforcement.

(4) The Court's interpretation of the Bank Secrecy Act's reporting requirement is justified. The argument that the District Court's interpretation is unnecessarily broad in that it appears to cover copies of personal checks, is irrelevant. The required reports compel banks to provide, in the government's own words, "a summary description of the nature of the transaction, the type, amount and denomination of the currency involved *and a description of the check involved in the transaction.*" (Govt. Brief 15). (Emphasis added).

(5) The Bank Secrecy Act fails to give adequate notice that a proscribed transaction has occurred in violation of the due process requirements of the Fifth Amendment.

(6) The Bank Secrecy Act provides that the required reports be signed *both* by the bank and by the bank customer involved. (Section 222). Section 103.22 of the Regulations, however, eliminates the requirement that the bank customer sign the report, and thereby denies him notice of the report in direct violation of Congressional intent.

(7) Since the Bank Secrecy Act's recordkeeping and reporting are inexorably tied, they are invalid for the same reasons.

(8) The California Bankers Association has standing to assert the rights of its members and their customers. An organization "whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). Although the government argues that the members of the California Bankers Association have "failed to show that they have sustained

. . . any direct injury as a result of the actual operation of the Act," they argue nonetheless that the reports required by the Act are based on the banks' "own records." To the extent the reports are based on the banks' own records, the banks are entitled to be secure in their papers and effects. Second, "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves," the standing principles set forth in such cases as *Broadrick v. Oklahoma,* —— U.S. —— 93 S.Ct. 2908, 2915 (1973), do not apply. Here, since the customer is given no opportunity to resist disclosure and in fact no notice that a report will be made, they have "no effective avenue of preserving their rights themselves."

ARGUMENT

1. The Reports Required by the Bank Secrecy Act Destroy the Work of This Court in Defining Reasonable Search and Seizure.

The Bank Secrecy Act was designed, in the government's words, "to reduce white-collar crime." (Govt. Brief 3). We begin then with a brief summary of the search and seizure standards applicable to criminal investigations.

Criminal Investigations—In the case of criminal investigations, a search warrant is required by the Fourth Amendment in all but a few "specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). No such exceptions exist here. Engaging in a currency transaction is *not* a criminal act. See *Carroll v. United States,* 267 U.S. 132 (1925). The reports required by the Act are not preceded by a lawful arrest. See, e.g., *United States v. Robinson,* No. 72-936, decided December 11, 1973; and *Agnello v. United States,* 269 U.S. 20 (1925). Nor are the reports evidence in support of a prior lawful arrest. See, *Cooper v. State of California,* 386 U.S. 58 (1967). Nor do currency transactions, as such, endanger

the lives of anyone. See, *Warden Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

The importance of the warrant requirement was recently emphasized in *United States v. United States District Court*, 407 U.S. 297 (1972). The question was whether a search warrant was required by the Fourth Amendment in a situation involving national security. *Id.* at 309. The Court recognized the basic importance of the government's interest (*Id.* at 310-312), but nonetheless stressed the need for a warrant.

> "Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals whom the *officer* might conclude were guilty of seditious libel. 'It is not fit,' said Mansfield, 'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.' *Leach v. Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765).
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> "Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.' *Coolidge v. New Hampshire*, [403 U.S. 443, 453 (1971)]; *Katz v. United States*, [389 U.S. 347, 356 (1967)]. The further requirement of 'probable cause' instructs the magistrate that baseless searches shall not proceed.
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> "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the executive branch. The Fourth Amendment does not contemplate the executive officers of Government as

> neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prosecute . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *Id.* at 316-317. (Emphasis in original).

The principles set forth in *United States v. United States District Court* are especially applicable here. We are not concerned with national security, "without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire,* 312 U.S. 569, 574 (1940). We are concerned instead with the apprehension of white-collar criminals. (Govt. Brief 3). Since their crimes, however serious, do not endanger the government's capacity to function, the warrant requirement is clearly applicable.[18]

The reporting required by the Bank Secrecy Act ignores the value to a free society of a "neutral and detached magistrate." *Coolidge v. New Hampshire,* 403 U.S. 443, 453 (1971). The Act substitutes instead the unlimited discretion of an officer in the executive branch. It allows an administrator to determine when and to what extent a citizen's bank currency transactions will be reported to the Federal bureaucracy. It endows the administrator with investigative and

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18. In *United States v. United States District Court, supra,* the government sought to justify warrantless wiretaps in aid of national security on the ground, *inter alia,* that there had been "1,562 bombing incidents in the United States from January 1, 1971, to July 1, 1971, most of which involved Government related facilities." *Id.* at 311, n. 12.

prosecutorial duties,[19] and then makes him the *sole* judge "of when to utilize constitutionally sensitive means in pursuing [his] tasks." *United States v. United States District Court, supra* at 317.

That we are concerned in this case with financial transactions, rather than telephone conversations, is irrelevant. In both cases, the citizen is simply employing the services of a basic utility to communicate—in one case his role in a bombing,[20] in this case the disposition of his currency. A citizen's use of a bank is no more a waiver of constitutional protection than a citizen's use of a private or public telephone.[21] Privacy is inherent in bank-customer relations,[22] and the use of a bank's services are no more a waiver of privacy than the use of a telephone. Banks, like telephone companies, are agents for their customers' intentions,[23] and as we attempted to make clear in our brief on appeal, a bank checking account affords a profile of the bank customer—social, political and financial—nearly as complete as the transcripts of his telephone conversations.[24]

Since the Bank Secrecy Act authorizes reports of currency transactions and "such other monetary instruments as the Secretary may specify" (Section 221), without the use of a warrant, there is no need to consider whether the Act complies with warrant safeguards. Suffice to say, a statute and regulations requiring immediate reports of all

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19. See Sections 205, and 207-211; and see 31 C.F.R. §§ 103.46, 103.49.

20. See, *United States v. United States District Court, supra,* at 299.

21. See, *Katz v. United States,* 389 U.S. 347 (1967).

22. *Peterson v. Idaho First Nat. Bank,* 83 Idaho 578, 367 P.2d 284, 290 (1961); and see CBA Brief 34-35.

23. For example, and pursuant to Section 4-201 of the Uniform Commercial Code (1966), banks are agents and subagents for the payor/owner of an item, such as a check, deposited for collection.

24. See, CBA Brief 19.

but an irrelevant class of $10,000 currency transactions, cannot substitute for probable cause—"the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness . . ." *Camara v. Municipal Court*, 387 U.S. 523, 534. (1967).

If, as the government appears to contend, the Fourth Amendment warrant requirement can simply be replaced by an administrator's finding that certain activity has "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings," then the Fourth Amendment has surely been repealed.

If the government can simply decide that certain events (e.g., telephone calls between suburban and ghetto areas, the sale of expensive autos to buyers with poor educations) have "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings," then there is no limit to the reports the government may require.

If the government can brush aside Fourth Amendment limitations by a simple finding that various papers and effects are useful, then the historic work of this Court in balancing competing interests will be destroyed.[25]

Administrative Searches—Even if we ignore legislative history,[26] and the government's recognition that the Bank Secrecy Act is designed to detect white-collar crime,[27] and turn instead to the Fourth Amendment standards applicable to an administrative investigation, one finds similar stress on the importance of a warrant.

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25. See, e.g., *Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. United States District Court*, 407 U.S. 297 (1971); and see generally, Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 Calif. L. Rev. 1011 (1973).

26. See discussion, *infra*, at 4-6; and see Stark Brief 19-27.

27. Govt. Brief 3.

In *Frank v. Maryland*, 359 U.S. 360 (1959), the Court upheld the arrest of a defendant who had refused to allow a health inspector to search his house for rats without a warrant. Mr. Justice Frankfurter, writing for a divided Court, ruled that the arrest did not violate the Fourth or Fourteenth Amendments. Seventeen years later, *Frank v. Maryland* was largely overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967).

> "[A]dministrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, such searches when authorized and conducted without a warrant procedure, lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections." *Id.* at 534.

In a companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), the Court ruled that the principle announced in *Camara* was applicable to a commercial structure.

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *Id.* at 543.

The Court then noted the crucial distinction between the right to inspect and the means of inspection.

> "The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search

by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.* at 544-545.

While *Camara* and *See* are thought to overrule *Frank v. Maryland, supra,* there was at least a specific finding by the Maryland health inspector in the *Frank* case that the defendant's house was in an "'. . . extreme state of decay,'" and that "in the rear of the house there was a pile later identified as 'rodent feces mixed with straw and trash and debris to approximately half a ton.'" *Frank v. Maryland, supra* at 361. Even though the search in the *Frank* case was conducted without a warrant, it was aimed at a particular house for a particular reason, explained in writing by the administrator involved.

No such protection exists here. Common to *Camara, See* and *Frank v. Maryland* is the notion that the search be (1) justified, (2) specific, and at least in the case of *Camara* and *See,* (3) pursuant to a warrant. Here, even assuming they could be justified, the reports required by the Bank Secrecy Act are *not* specific and do *not* permit judicial review. The occurrence of the proscribed transaction gives rise to the required report. There are no means available for judicial review.

Engaging in a currency transaction is not the same as selling guns or liquor. See, *United States v. Biswell,* 406 U.S. 311 (1972) and *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). In the foregoing cases, the government "knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns." *Almeida-Sanchez v. United States,* —— U.S. ——, 93 S.Ct. 2535, 2539 (1973). Here, the government is on a classic fishing expe-

dition—one which its own statistics suggest will result in a meagre catch.[28]

Administrative Summonses—Even if regarded as analogous to an administrative summons, the reporting requirements of the Bank Secrecy Act violate the Fourth Amendment.

Consider, for example, the use and enforcement of administrative summonses issued by the Internal Revenue Service.[29] If the summons is directed to the taxpayer and he refuses to comply, certain standards must be met before the District Court can order enforcement. Writing for the majority in *United States v. Powell*, 379 U.S. 48 (1964), Mr. Justice Harlan ruled that while the Commissioner of Internal Revenue need not show probable cause, he must demonstrate:

> "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.[30]

Here, there is *no* opportunity to challenge the Act's reporting requirements. Whereas enforcement of an IRS summons can only come "by federal court authority in 'an adversary proceeding' affording the opportunity for challenge and 'complete protection to the witness,' "[31] the duty

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28. We are told by the government that of the 40,000 currency transaction reports generated by the Trading With the Enemy Act in 1958 and 1959, *less than .3%* (129 out of 40,000) led to "completed" tax cases— whatever that means. (Govt. Brief 36 n. 21, 38.)

29. See, Act of August 16, 1954, c. 736, 68A Stat. 901 (26 U.S.C. § 7602).

30. The *Powell* case involved a summons directed to the president of a corporate taxpayer, and in a companion case involving an individual taxpayer, this Court set forth the same enforcement standards. See *Ryan v. United States*, 379 U.S. 61 (1964).

31. *Donaldson v. United States*, 400 U.S. 517, 525 (1971).

to report imposed by the Bank Secrecy Act is immediate and automatic. Failure to report is a crime. (Section 209). Since the Act excludes judicial consideration, there is no opportunity for challenge or intervention—by anyone.

Required Reports—Finally, even if the reports required by the Bank Secrecy Act are deemed analogous to the required reports approved in such cases as *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *Yakus v. United States*, 321 U.S. 414 (1944) the Act is invalid.

Congress may, of course, require private citizens and business entities to keep records and make reports. *United States v. Morton Salt Co., supra,* at 647-651. But those records and reports must be reasonably related to a *specific* purpose. *Shapiro v. United States,* 335 U.S. 1, 32 (1948); *Yakus v. United States,* 321 U.S. 414, 424 (1944); *United States v. Darby,* 312 U.S. 100, 125 (1941). In *Morton Salt,* for example, the required reports were in aid of a cease and desist order issued by the Federal Trade Commission. In the *Shapiro* and *Yakus* cases, the required reports were essential to the enforcement of a wartime price control act. The reports approved in *Darby* were required in the enforcement of a Federal wages and hours law.

Second, this Court has consistently confined compulsory reporting to that required to monitor either (1) the reporting entity, or (2) the reporting entity's business. Legislation requiring gamblers to report income or employees to report wages and hours is primarily aimed at monitoring the reporting entity. See, e.g., and respectively, *Marchetti v. United States,* 390 U.S. 39 (1968) and *United States v. Darby,* 312 U.S. 100 (1941). Legislation requiring firearms dealers or drug manufacturers to maintain sales records is designed to monitor the marketing of their respective wares. See, e.g., and respectively, 18 U.S.C. § 923(g) and

21 U.S.C. § 827(b).[32] The latter are designed to monitor both the recordkeeper and the buyer. See generally, *United States v. Miller*, 426 F.2d 794 (4th Cir. 1970). Here, the reports required by the Bank Secrecy Act have *nothing* to do with the regulation of banks or other financial institutions. There is no suggestion in the Act's legislative history, and there can be no suggestion in this litigation, that the Bank Secrecy Act is required or even involved in the regulation of America's financial industry.

Finally, and perhaps most important, the reports required by the Bank Secrecy Act undermine the "required records" standards set forth in *Shapiro v. United States*, 335 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 39 (1968); and *Grosso v. United States*, 390 U.S. 62 (1968).

To be used in a criminal prosecution of the reporting party, the foregoing cases require, first, that the records and reports be ones that would "customarily" be kept; second, they must have some specific "public aspect"; and third, they must have arisen out of an "essentially noncriminal and regulatory area of inquiry." *Marchetti v. United States*, 390 U.S. 39, 57 (1968)[33]. In other words, the government cannot use required records against the recordkeeper in a criminal prosecution unless they would (1) ordinarily be kept in any event; (2) serve some specific public, as opposed to private, purpose; and (3) arise in a civil context.

The foregoing limitations are designed, of course, to protect the defendant from compulsory self-incrimination, and *Shapiro, et al.*, are Fifth Amendment cases. But the

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32. Act of October 22, 1968, Title I, § 102, 82 Stat. 1222 and Act of October 27, 1970, Title II, § 307, 84 Stat. 1258.

33. See, McKay, *Self-Incrimination and the New Privacy*, 1967, Sup. Ct. Rev. 193, 214-217; and Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum. L. Rev. 681 (1965).

interest to be protected here (freedom from unreasonable search and seizure) is at least as strong as the interest at issue in *Shapiro, et al.,* (freedom from compulsory self-incrimination), and the foregoing safeguards are clearly applicable. The reports in question and the information on which they are based are *not* ordinarily kept by financial institutions.[34] While they arguably serve a public purpose, the reports required by the Act do not arise in a civil context. The Bank Secrecy Act, the government reminds, is designed "to reduce white-collar crime." (Govt. Brief 3).

The safeguards outlined in *Shapiro, et al.,* are applicable regardless of whether the reports required by the Act are based on the banks' own records or the records of their customers.

Even if one were to accept the government's erroneous contention[35] that the required reports are based on "the banks' own records" (Govt. Brief 33), then the banks are entitled to the usual Fourth Amendment protection afforded papers and effects (i.e., a warrant, subpoena or summons), and at least some opportunity to challenge the search. The Bank Secrecy Act simply by-passes the foregoing safeguards, and gives the Treasury Secretary authority to *compel* a detailed disclosure of whatever currency transactions he decides have "a high degree of usefulness in criminal, tax and regulatory investigations or proceedings." (Section 121).

If, on the other hand, the reports are based on information supplied by bank customers, then the Act's reporting requirements destroy the *customers'* Fourth Amendment safeguards by providing reports on the customers' financial affairs without a warrant, summons, or opportunity for judicial challenge and review.

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34. See discussion, *infra,* at 28-29.

35. See discussion, *infra,* at 28-31.

In summary, if the required reports are based on records that "belong" to the banks, then the banks are entitled to Fourth Amendment protection. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946). If the required reports are based on records that "belong" to the banks' customers, then those customers have a right to the protection of the Fourth Amendment.

Summary—Common to the criminal and administrative Fourth Amendment cases decided by this Court is the view that the government must obtain a search warrant whenever possible. The exceptions, in turn, have been limited to specific persons under specific circumstances.

The search authorized by the Bank Secrecy Act destroys the foregoing limitations.

By simply declaring an entire class of financial transactions highly useful "in criminal, tax, and regulatory investigations and proceedings," and then requiring reports of their occurrence, the government ignores the balance this Court has attempted to maintain between the government's need to know and the right of the citizenry to be secure in their papers and effects. The reporting requirements of the Bank Secrecy Act simply do away with what Mr. Justice Jackson once described as the on-going work of the Court.

> "The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression. These are the competing considerations involved in judging any measures which government may take to suppress or disadvantage its opponents and critics." *American Communications Ass'n. v. Douds*, 339 U.S. 382, 445 (1950).

If Congress can simply declare certain events (e.g., telephone conversations) useful "in criminal, tax and regula-

tory investigations and proceedings," and then require detailed reports on their occurrence, the work of this Court in maintaining the balance between liberty and authority would soon come to an end.

2. Regardless of Whether They Are Based on the Banks' Own Records or the Records of Their Customers, the Reports Required by the Bank Secrecy Act Violate the Fourth Amendment.

In an effort to salvage the Bank Secrecy Act's reporting requirements, the government argues that since the reports required by the Act are based on "the bank's own records, no seizure of any tangible or intangible property of the bank customer is involved." (Govt. Brief 33). The argument seems to be that since that Act's reporting requirements are aimed at bank customers, the Fourth Amendment limitations on search and seizure do not apply. (Govt. Brief 31).

With all due respect, the government's argument is irrelevant, and fails for at least two separate reasons.

First, the reports required by the Act are *not* based "on the bank's own records." They are based on information provided banks by their customers, including (1) the name, address, business or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted; (3) a summary description of the "nature" of the transaction, the type, amount and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented by the customer, and (5) the identity of the reporting institution.[36] Virtually *none* of the foregoing information is re-

36. See Department of the Treasury Form 4789, included with the government's Jurisdictional Statement at App. 121; see Govt. Brief 14-15; and see 31 C.F.R. § 103.22, requiring banks to list and, at the request of the Secretary to report those bank customers the bank concludes are exempt from the currency transaction reports.

quired by a bank to conduct a currency transaction. It is common knowledge that currency may be deposited in a bank account by simply filling-out a deposit slip, setting forth the amount involved, the date, and the name or other identification of the account. Similarly, a bank customer may withdraw currency from an account over which he has signature authority by simply signing and filling-out a withdrawal slip and setting forth the amount, date, and identity of the account. Banks have no need whatever for the "business or profession" of the depositor; no need whatever for the identity of the "person or organization for whom the transaction was conducted" and no interest whatever in the "nature" of the transaction.

The reports required by the Act are really based on information and instructions provided banks by their customers. Most of the time, the instructions are in writing in the form of deposit or withdrawal slips. Sometimes the instructions and information are provided in person, other times they are delivered by mail. In any case, deposit and withdrawal slips are essentially messages from a bank customer to his bank. They no more "belong" to the bank than instructions to a telephone operator "belong" to the telephone company. A currency transaction is, of course, normally reflected for a time by a bank's records, just as long distance telephone calls are reflected for a time by telephone company records. There is no essential difference between instructions given to a telephone company by dialing a number, and instructions given to a bank in the form of a deposit slip.

Second, even if we assume that the reports required by the Act were based on bank records, *then the Fourth Amendment operates in favor of the bank. Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946). The government's argument that since the reports are based on *bank* records, the Fourth Amendment does not apply (Govt. Brief 33) is

—with all due respect—an affront to common sense. It would mean, for example, that the papers and effects of a citizen containing information about another citizen could be seized and searched without a warrant, summons, or official justification. The government's argument would mean, for example, that the government could search and seize bank, telephone company or public utility records at will.

The fallacy inherent in the government's argument can be seen another way. The reporting requirements of the Act operate without judicial supervision or review. As such, the Act destroys the protection and control relied on by this Court in such cases as *Reisman v. Caplin,* 375 U.S. 440 (1964) and *Donaldson v. United States,* 400 U.S. 517 (1970). In *Donaldson,* for example, the Internal Revenue Service had issued an administrative summons for various writings and documents pertaining to a taxpayer, *but owned by the respondent. Id.* at 522-523. The taxpayer moved to intervene. The motion was denied. But implicit in the motion to intervene and in the discussions in each of the foregoing cases is the fact that enforcement of the summons could only come "by federal court authority in an 'adversary proceeding' affording the opportunity for challenge and 'complete protection to the witness.'" *Id.* at 525. The Bank Secrecy Act affords no such protection. The duty to report is immediate and automatic. (31 C.F.R. §§ 103.22 and 103.25). The requirements of the Bank Secrecy Act afford *no* opportunity for challenge or intervention by anyone.

—There is simply no legal or material difference between a statute requiring banks to report certain financial transactions, and a statute requiring telephone companies to report all telephone calls made to persons in a particular classification—e.g., ghetto residents, Sicilian immigrants, gambling casino employees, etc.

—There is no real difference between the reporting compelled by the Bank Secrecy Act and a law requiring reports from retail merchants on all purchases found by an administrator to have "a high degree of usefulness in criminal tax and regulatory investigations and proceedings."

—There is simply no legal or material distinction between the reporting requirements of the Bank Secrecy Act and a statute authorizing reports from the postal service on mail received by persons or classes of persons found by an administrator to be highly useful "in criminal, tax, and regulatory investigations and proceedings."

—There is simply no legal or material difference between a statute requiring banks to report, promptly and automatically, certain $10,000 currency transactions, and legislation requiring landlords to monitor and report on tenants who stay out late, subscribe to detective magazines, or act tough.

The hypothetical legislation described above might well have "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings." But like the statute now before this Court, it would destroy the Fourth Amendment balance this Court has established between the government's need to know and a citizen's right to be secure in his papers and effects.

3. Since the Bank Secrecy Act Violates the Constitution, the Existence of Cautious Regulations Is Irrelevant.

In what amounts to its main defense of the Bank Secrecy Act's reporting requirements, the government argues that the regulation now in effect, requiring reports of certain $10,000 currency transactions, "is not unduly broad, but is narrowly directed to the category of transactions that is most likely to be indicative of questionable activity." (Govt. Brief 39). The government asks the Court to avoid the "hypothetical application of the statute feared by plaintiffs and the district court . . ." (Govt. Brief 28).

The government's argument simply ignores the familiar principle that narrow application will not salvage an invalid statute. *Agnello v. United States*, 269 U.S. 20, 33 (1925); *Katz v. United States*, 389 U.S. 347, 356-357 (1967); *United States v. United States District Court*, 407 U.S. 297, 317 (1972). In *Katz*, for example, the government argued, as it does now, that since its agents "did no more . . . than they might properly have done with prior judicial sanction, [the Court] should retroactively validate their conduct." *Katz v. United States*, *supra* at 356.

> "That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Id.* at 356-357.

In *United States v. United States District Court*, 407 U.S. 297 (1972), the Court recognized that the wiretap in question might well have been reasonable and "one which readily would have gained prior judicial approval." *Id.* at 317. But the Court then quoted the foregoing language in *Katz* and said:

> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be

reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *Id.* at 317 (Footnote and citation omitted).

In summary, even if one assumed a high correlation between $10,000 currency transactions and the commission of a crime, the Fourth Amendment requires adherence to judicial process. *United States v. Jeffers*, 342 U.S. 48, 51 (1951). The requirements of the Fourth Amendment cannot be abridged in the name of effective law enforcement. *Berger v. New York*, 388 U.S. 41, 60-62 (1967).

We have reached a time where it is technically feasible to monitor and record what every citizen is doing all the time.[37] The question then, now more than ever before, is simply this: what kind of surveillance will the dictates of the Fourth Amendment tolerate? Where, as here, there is no opportunity whatever for judicial supervision or review, the statute clearly destroys the force and effect of the Fourth Amendment.

4. The District Court's Interpretation of the Bank Secrecy Act's Reporting Requirements Is More Than Justified.

The government argues that the District Court's interpretation of the Bank Secrecy Act's reporting requirements is "unnecessarily broad" and that the Act cannot be used by the Treasury Secretary to demand "detailed reports of all domestic financial transactions, including copies of personal checks." (Govt. Brief 25).

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37. See generally, Westin & Baker, *Data Banks in a Free Society* (1972), and U.S. Department of Health, Education & Welfare, *Records, Computers and the Rights of Citizens: Report of the Secretary's Advisory Committee on Automated Personal Data Systems* (1973).

The basic question, however, is whether under *any* interpretation the Act and regulations are valid. As we have attempted to make clear, the reporting requirements of the Act plainly violate the Fourth Amendment safeguards established by this Court, regardless of the circumstance.

Responding, nonetheless, to the government's criticism of the District Court's opinion, we note, first, that the reports required by the Act *do* entail personal checks. The report form (Department of the Treasury Form 4789) requires banks to provide, in the government's own words, "a summary description of the nature of the transaction, the type, amount and denomination of the currency involved *and a description of any check involved in the transaction.*" (Govt. Brief 15). (Emphasis added). The Act leaves the definition of a proscribed "transaction" to the Secretary (Section 221), and as noted above, the reports in question require a wide range of information unrelated to the deposit or withdrawal of currency to or from a bank account.[38]

Second, the criteria for required reports belies a narrow construction. Section 202 authorizes reports having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." The government argues that the resulting reporting requirements have been "narrowly" drawn. (Govt. Brief 39). Yet the *same* standard ("high degree of usefulness in criminal, tax . . ." etc.) has been used by the Secretary to require banks and others to copy and retain virtually every piece of paper that passes through America's domestic banking system. (Section 101(b); 31 C.F.R. §§ 103.31, 103.33; and see CBA Brief 20-25). The standard for required reports (Section 202) and required records (Section 101(b)) is identical. The only real limitation on the number and nature of reports that may be

38. See discussion, *infra* at 28-29.

required by the Act is the ability of the Treasury Department to assimilate and disseminate reported information. The *real* reason the Treasury Secretary currently limits required reports to $10,000 currency transactions was suggested by former Commissioner of Internal Revenue, Randolph W. Thrower.

> "Theoretically, the retention of extensive records of banking transactions would meet our needs. Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem". *Hearings on H.R. 15073 Before the House Committee on Banking and Currency,* 91st Cong., 1st and 2nd Sess., 68 (1970).

5. Since There Is No Way to Be Certain a Proscribed Transaction Has Occurred, the Bank Secrecy Act Fails to Give Adequate Notice in Violation of Due Process.

Section 221 provides that transactions involving "the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify" are to be "reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require."

In turn, Section 103.22 of the regulations provides in part:

> "Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.
>
> Except as otherwise directed in writing by the Secretary, this section shall not . . . (3) require a bank to report transactions with an established customer

> maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him." 31 C.F.R. § 103.22.

Section 103.22 of the regulations imposes the duty to report on banks, and Sections 209 and 210 subject the latter to criminal penalties for willful violation. The regulation, however, is singularly vague and would appear to be in violation of the familiar due process requirement of adequate notice. See, e.g., *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951, *rehearing denied*, 341 U.S. 956 (1951); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

The requirement of adequate notice was explained in *Connally v. General Const. Co., supra*, as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* at 391.

Here, 31 C.F.R. § 103.22 requires banks to determine whether a given currency transaction exceeds "amounts

commensurate with the customary conduct of the [customer's] business, industry or profession." The regulation has a twin vice: while its usefulness to the government is largely dependent on the judgment, prejudice and experience of financial institution employees, the penalties for error are severe, cumulative and certain. The regulations take no account of—and in fact can be read as specifically aimed at—organizations and committees that often obtain large amounts of currency at rallies and meetings. The fact that a failure to report must be willful (Section 209) is little comfort. "Willful" has been called a word "of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). When used in a criminal context, "it generally means an act done with a bad purpose." *United States v. Murdock*, 290 U.S. 389, 394 (1933). In the case of 31 C.F.R. § 103.22, "bad purpose" may simply be a decision by an employee of a financial institution not to report a currency transaction.

6. The Bank Secrecy Act Regulation Requiring Reports of Certain $10,000 Currency Transactions (31 C.F.R. § 103.22) Expressly Violates a Requirement of the Act.

Quite apart from constitutional infirmities, Section 103.22 of the regulations clearly violates a modest notice requirement of the Act.

Section 222 of the Act provides:

> "The report of any transaction required to be reported under this chapter shall be signed or otherwise made *both* by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require." (Emphasis added).

In the case of domestic currency transactions, however, the implementing regulation simply requires a report by the financial institution involved—not by the customer and party to the transaction.[39] 31 C.F.R. § 103.22 simply requires in pertinent part that "[e]ach *financial institution* shall file a report of each deposit, withdrawal, exchange of currency or other payment . . . which involves a transaction in currency of more than $10,000." (Emphasis added).

The government would, of course, receive a report from the financial institution in any event. But 31 C.F.R. § 103.22 means the customer will have no way of knowing that a report was made.

This omission is in direct conflict with the intent of Congress, as explained in the Report of the House Banking and Currency Committee on Section 222 of the Act.

> "The bill requires that reports be filed *both* by the financial institution involved and by one or more of the other parties to or participants in the transaction, as the Secretary may require. The purpose of this is twofold. First, it permits the prosecution of a person who supplies false information for such a report and signs it. Secondly, *it relieves the institution of any pressure the Secretary of the Treasury might otherwise be inclined to exert to require it to submit reports of this type without notifying the customer.* The latter procedure raises serious questions in respect to the fiduciary duty of financial institutions to their customers, not to mention the right of privacy or simply fairness."[40] (Emphasis added).

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39. In the case of monetary *exports*, however, 31 C.F.R. § 103.23 requires a report from the person involved, including those situations where the person "aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person."

40. 2 U.S. Code Cong. and Admin. News, 4394, 4407 (91st Cong. 2nd Sess. 1970). Both H.R. 15073 and S. 3678 were considered by the Committee, and they contain identical versions of what became Section 222 of the Bank Secrecy Act.

By failing to adopt a regulation in accord with the requirements of Section 222, the Treasury Secretary has ignored the intent of Congress and raised "serious questions in respect to the fiduciary duty of financial institutions to their customers, not to mention the right of privacy or simply fairness."

Section 10(e) of the Administrative Procedure Act provides in part that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . (3) in excess of statutory jurisdiction, authority limitations, or short of statutory right."[41] It would appear to follow, then, that 31 C.F.R. § 103.22 is invalid, quite apart from constitutional objections. See also, *Kent v. Dulles*, 357 U.S. 116, 129-130 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-589 (1952); and *Ex parte Mitsuye Endo*, 323 U.S. 283, 299 (1944).

7. Since the Bank Secrecy Act's Required Recordkeeping and Reports Are Inexorably Tied, They Are Invalid for the Same Reasons.

In our brief on appeal, we attempted to show that the Bank Secrecy Act's recordkeeping requirements were the handmaiden of the Act's domestic reporting provisions. (See CBA Brief 37-39). We respectfully refer the Court to that discussion here.

The extent to which the Act's recordkeeping and reporting requirements are mutually dependent was recently recognized again by the government.

> "Moreover, the utility of the reporting provisions becomes even more apparent when they are viewed in context as a part of the entire Bank Secrecy Act. Title I requires financial institutions to maintain records so that they will be available for subpoena or summons

41. Act of June 11, 1946, c. 324, § 10(e), 60 Stat. 243 (5 U.S.C. § 706)

> by law enforcement officials. But the effectiveness of these provisions, which the district court upheld . . . depends on whether those engaging in illegal activities use written instruments such as checks and on whether the investigatory agencies know of the financial institutions with which they deal. Reports by financial institutions of large currency transactions by nonestablished customers prevent underworld figures from evading the effect of the Title I recordkeeping provisions and supply leads for determining which records should be summoned or subpoenaed." (Govt. Brief 39-40).

For the reasons set forth in our brief on appeal (CBA Brief 15-40), we believe the Bank Secrecy Act's recordkeeping requirements to be plainly unconstitutional. As the handmaiden of the recordkeeping provisions, the Act's reporting requirements are invalid for the same reasons.

8. The California Bankers Association Has Standing to Assert the Constitutional Rights of Its Members and Their Customers.

The government argues, as it has before,[42] that the California Bankers Association has no standing to assert the constitutional rights of its members' customers. (Govt. Brief 22-23).

In reply we note, first, that "an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). The basic question is said to be whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . ." *Baker v. Carr,* 369 U.S. 186, 204 (1962).

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42. See, e.g., *Motion to Affirm,* filed by the government in Nos. 72-985 and 72-1196, at 9, 23.

Here, the government is in a curious position. The government argues that the members of the California Bankers Association "failed to show that they have sustained or are in imminent danger of sustaining any direct injury as a result of the actual operation of the Act." (Govt. Brief 23). At the same time, the government argues that the reports required by the Act are based on "the bank's own records." (Govt. Brief 31 and 33). According to the government then, the Act requires the wholesale disclosure of records *owned* by the bank, and no opportunity to assert any rights of ownership, including specifically, freedom from unreasonable search and seizure. The Bank Secrecy Act, according to the government, offers a paradox in which banks are obliged to reveal the contents of their records with no standing to challenge disclosure for any reason on any ground.

Second, the government's reliance on *Broadrick v. Oklahoma*, —— U.S. ——, 93 S. Ct. 2908 (1973) appears misplaced.[43] The Court recognized in *Broadrick* that "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves," the standing principles set forth in the case may be excepted. *Id.* at 2915.

The foregoing exception applies here.

The reporting requirements of the Bank Secrecy Act require *banks* to report the details of their customers' currency transactions. (Section 222, 31 C.F.R. § 103.22). The customer is given no opportunity to resist disclosure — and in fact no notice that a report will be made to the government.[44] The banks' duty to report is immediate and automatic. (31 C.F.R. §§ 103.22, 103.25). The banks' customers

43. See, Govt. Brief 22-23.

44. See discussion, *supra* at 37-39.

have "no effective avenue of preserving their rights themselves."

Bank customers are in a position analogous to the absent parties in *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court held that the NAACP could assert the rights of its members, and said:

> "The principle [requiring standing] is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." *Id.* at 459.

Here, since the Act affords no opportunity to contest disclosure in a judicial forum; since banks rather than their customers have the duty to report; and since the duty to report is immediate and automatic, this case provides the only viable test available.

It is clearly unreasonable to expect a depositor to seek declaratory relief[45] just prior to engaging in a $10,000 currency transaction, just as few if any depositors would be willing to pursue declaratory relief in anticipation of future currency transactions.

The member banks of the California Bankers Association, however, have a direct and continuing interest in preserving a confidential relationship with their customers—a "personal stake in the outcome of the controversy." *Baker v. Carr, supra* at 204.

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45. See, Act of May 24, 1949, c. 139, § 111, 63 Stat. 105 (28 U.S.C. § 2201).

CONCLUSION

For the reasons stated here, and for the reasons stated in our brief on appeal, it is respectfully submitted that (1) the order of the District Court enjoining enforcement and operation of Sections 221, 222 and 223 of the Bank Secrecy Act be *affirmed;* and that (2) the order of the District Court denying the California Bankers Association's motion for a preliminary injunction, restraining the enforcement and operation of Title I and implementing regulations of the Act, should be *reversed.*

December 21, 1973

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Appendix A

The Constitution of the United States of America

Amendments

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114

TITLE I—FINANCIAL RECORDKEEPING

Chapter 1.

Insured Banks and Insured Institutions

§ 101. Retention of Records by Insured Banks—Congressional Findings and Declaration of Purpose

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness

in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank

shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

§ 102. Retention of Records by Insured Institution

The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in Section 21 of the Federal Deposit Insurance Act with respect to insured banks."

Chapter 2.
Other Financial Institutions

§ 121. Congressional Findings and Declaration of Purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 122. Reports on Ownership and Control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

§ 123. Recordkeeping and Procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degre of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) any records or evidence of any type which the Secretary is authorized under section 21b of the Federal

Deposit Insurance Act to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

§ 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or

temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

§ 125. Civil Penalties

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 126. Criminal Penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 127. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any regulation under this chapter, section 21b of the Federal Deposit Insurance Act, or section 411 of the National Housing Act where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

§ 129. Administrative Procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 21b of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS

Chapter 1.
General Provisions

§ 201. Short Title

This title may be cited as the "Currency and Foreign Transactions Reporting Act".

§ 202. Congressional Declaration of Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and Rules of Construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;
(14) a dealer in precious metals, stones, or jewels;
(15) a pawnbroker;
(16) a loan or finance company;
(17) a travel agency;
(18) a licensed transmitter of funds;
(19) a telegraph company;
(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or
(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

(k) For the purposes of section 1001 of Title 18, United States Code, the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

§ 204. Regulations

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

§ 205. Compliance

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

§ 206. Exemptions

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

§ 207. Civil Penalty

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United

States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

§ 209. Criminal Penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

§ 210. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

§ 211. Immunity of Witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 212. Availability of Information to Other Federal Agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may be regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

§ 213. Administrative Procedure

Subject to section 203(j) the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 4, United States Code, shall apply to all proceedings under this title.

Chapter 2.
Domestic Currency Transactions

§ 221. Reports

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require

if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons Required to File Reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting Procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution,

except that (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Chapter 3.

Reports of Exports and Imports of Monetary Instruments

§ 231. Reports—Persons Required to File

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the follow-

ing information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

§ 232. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 231(i) either has not been filed or contains material omissions or mistatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until

the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

§ 233. Civil Liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 232.

§ 234. Remission of Forfeiture or Penalty

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

§ 235. Enforcement Authority

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 231 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Chapter 4.
Foreign Transactions

§ 241. Records and Reports Required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

§242. Classifications and Requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

Appendix C

31 C.F.R. § 103.

Note—After this litigation began and the District Court had rendered its opinion, the Secretary of the Treasury amended various sections of the Bank Secrecy Act regulations. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). For the convenience of the Court and counsel, we have set forth the amended regulations immediately following each of the sections to which the amendments apply. Additions to the original regulations are set in italics. Deletions are indicated by a line through the deleted word or words.

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 Meaning of Terms

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that

title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 103.11 Meaning of Terms [As Amended]

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank *(except bank credit card systems);*

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

~~(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;~~

(5) ~~(6)~~ a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type or commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 Determination by the Secretary

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of Currency Transactions

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Report of Transportation of Currency or Monetary Instruments

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures

or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instru-

ments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 Reports of Foreign Financial Accounts

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 Filing of Reports

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 Identification Required

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 Determination by the Secretary

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the

type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be Made and Retained by Financial Institutions

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 Additional Records to be Made and Retained by Banks

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer,

comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one ocasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.34 Additional Records to be Made and Retained by Banks [As Amended]

(a)(1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall *within forty-five days from the date such an account is opened,* secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. *In the event that a bank has been unable to secure the identification required herein with respect to an account within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if (i) it has made a reasonable effort to secure such identification, (ii) it maintains a list containing the names, addresses and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses and account numbers of those persons available to the Secretary as directed by him.*

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS-4 or SS-5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and in-

strumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (a) ambassadors, ministers, career diplomatic or consular officers, or (b) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions and immunities as an international organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10, and (viii) Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a)(3)(vii) and (viii) of this section, the bank shall, within fifteen days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpayer identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under Section 6109 of the Internal Revenue

Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn ***for $100 or less or those drawn*** on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item ***in excess of $100*** (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, invest-

ment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, ~~or investment securities,~~ and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check *in excess of $100* deposited in such account through its domestic processing system or to supply a description of a deposited check *in excess of $100*. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 Additional Records to Be made and Retained by Brokers and Dealers in Securities

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification

number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

§ 103.35 Additional Records to be Made and Retained by Brokers and Dealers in Securities [As Amended]

3. Subpart C is further amended by amending § 103.35 by deleting "paragraph (1)" in paragraph (a)(2), and substituting therefore the words "paragraph (a)(1) of this section"; and by deleting "subsection (1)" in paragraph (a)(3), and substituting therefor the words "paragraph (a)(1) of this section."

§ 103.36 Nature of Records and Retention Period

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person Outside the United States

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person

making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 Dollars as Including Foreign Currency

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or Other Reproductions of Government Obligations

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of Information

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired,

the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

§ 103.43 Availability of Information [As Amended]

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor. *Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.*

§ 103.44 Disclosure

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 Exceptions, Exemptions, Modifications, and Reports

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes

of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.45 Exceptions, Exemptions, ~~Modifications~~, and Reports [As Amended]

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, *or* grant exemptions from, ~~impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify,~~ the requirements of this part. Such exceptions, *or* exemptions, ~~requirements or modifications~~ may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 Enforcement

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 Civil Penalty

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any

material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 Forfeiture of Currency or Monetary Instruments

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 Criminal Penalty

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 Enforcement Authority with respect to Transportation of Currency or Monetary Instruments

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 Effective Date

This part shall become effective July 1, 1972.

§ 103.51 Access to records [As Amended]

~~This part shall become effective July 1, 1972.~~

Except as provided in §§ 103.34(a)(1) and 103.35(a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1073

GEORGE P. SHULTZ, *et al.*,

Appellants,

—v.—

CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., *et al.*,

Appellees.

No. 72-985

CALIFORNIA BANKERS ASSOCIATION,

Appellant,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

No. 72-1196

FORTNEY H. STARK, JR., *et al.*,

Appellants,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES FORTNEY H. STARK, JR., *ET AL.*

(Appellees in No. 72-1073)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1073

GEORGE P. SHULTZ, *et al.*,

Appellants,

—v.—

CALIFORNIA BANKERS ASSOCIATION, FORTNEY H. STARK, JR., *et al.*,

Appellees.

No. 72-985

CALIFORNIA BANKERS ASSOCIATION,

Appellant,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

No. 72-1196

FORTNEY H. STARK, JR., *et al.*,

Appellants,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES FORTNEY H. STARK, JR., *ET AL.*

(Appellees in No. 72-1073)

Summary of Argument

The government's argument that appellees lack standing to challenge the domestic reporting provisions of the Bank Secrecy Act is both irrelevant and unpersuasive. It is irrelevant because the Act and its regulations comprise a single, unified scheme for the collection of evidence of crime, isolated portions of which cannot be severed or litigated piecemeal. It is unpersuasive because appellees are asserting their own rights, and because appellees meet all the traditional requirements for having standing to assert the rights of those not parties to the litigation.

The government's argument that the District Court acted on "the conjectural outer limits of hypothetical regulations" while ignoring a properly "narrow" construction of the Act is an attempt to take advantage of amendments made after and in response to the District Court's decision, and represents an interpretation of the Act that is not "narrow" at all but reaches everything the District Court read the Act to reach.

The government's argument that the domestic reporting requirements of the Act are "reasonable" is only a plea of utility and convenience to law enforcement—it ignores the requirements of the Fourth Amendment that searches for evidence of crime be reasonable in scope and supported by warrants issued only upon probable cause.

I.

The Bank Secrecy Act is an indivisible whole which cannot be severed or litigated piecemeal. Appellees' asserted lack of standing to attack isolated portions of the Act is therefore irrelevant.

Appellees view the Bank Secrecy Act as an inseparable whole, the fate of which will be decided not only in this appeal but in the two consolidated appeals as well. If this Court in the consolidated appeals reaches the merits, it will be obliged to adjudicate the validity of the entire Act rather than severing the reporting requirements on the ground that no litigant has standing to challenge them.

The best evidence that the Act is an inseparable whole is its lack of a severability clause. This absence, while by no means determinative of the issue, *United States* v. *Jackson*, 390 U.S. 570, 585 (1968), has long been understood to create a presumption that Congress intended the Act to be an indivisible whole. See, *e.g.*, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936); *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241-42 (1929).

The next best evidence of Congressional intent that the Act be an indivisible whole is the interrelationship of its provisions, an interrelationship described at length by the Government itself. In its Jurisdictional Statement (p. 9) the Government charged that the partial injunction issued by the Court below had created "a serious gap in the Bank Secrecy Act that significantly impairs the statutory scheme . . . ," and later (pp. 17-18) expanded upon that theme by saying that the currency reporting requirements "prevent underworld figures from evading the effect of the record-

keeping provisions in Title I and supply leads for determining which records should be summoned or subpoenaed." In its Opening Brief the Government repeats that argument (Gov't OB 40), and offers a "narrow" construction of the Act premised on the theory that Congress intended the reporting requirements to begin precisely where the recordkeeping requirements end; a report will be made of a transaction which otherwise might evade the recordkeeping requirements because conducted "'without leaving a record of the chain of ownership.'" *Id.* at 27. Then the government adds another such argument: that the currency transactions required to be reported are often the beginning or the end of "more sophisticated and complex conversion procedures" that frequently involve the transportation of currency or monetary instruments abroad; thus the absence of the domestic reporting requirements weaken the foreign reporting requirements as well. (*Id.* at 40.)

We think the Government correctly perceives the interrelationship of the entire Act. We add that the empirical and legal assumptions upon which it operates are the same throughout the Act, and note, as did this Court in *Marchetti* v. *United States*, 390 U.S. 39, 56, n. 14 (1968), that there is "no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States."

If the Act is not severable, and if the Court reaches the merits of appellants' claims in the consolidated appeals, then appellees' standing to attack the domestic reporting requirements alone will be irrelevant.

II.

Whether or not the Bank Secrecy Act is severable, appellees have standing to challenge the reporting requirements.

No party to these appeals alleges that he has or will engage in a reportable transaction involving more than $10,000 in currency. Relying on that fact, the Government repeatedly urges or implies (Gov't OB 6, 16, 22, 33) that no appellee has standing to challenge the reporting requirements. Even putting aside for the moment the fact that the reporting requirements have been lessened since the District Court acted, the government's conclusion is incorrect.

There can be no doubt that the bank appellees have standing to challenge the reporting requirements. They alleged and proved that the requirements will injure them financially through loss of customer confidence, and proved in the court below that additional expenditures would be required in order to comply with the $10,000 currency reporting requirements (App. 19-20). Moreover, banks, while perhaps not as fully protected by the Fourth Amendment as private citizens, still enjoy the right to be free from unreasonable searches and seizures. *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906). *See also, United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946); *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924). If there is any merit at all in the Government's argument (Gov't OB 31) that the reporting requirements involve only "a bank's own records", then a bank unquestionably has standing to claim that the demand for those records violates

the Fourth Amendment because it is "out of proportion to the end sought." *McMann* v. *Securities and Exchange Comm'n*, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand, J.).

On the other hand, any bank customers engaging in transactions required to be reported are entitled to assert their constitutional rights because, as argued *infra*, at pp. 15-21, the Act and Regulations make such reports the joint products of the institution and the customer (as indicated above), because the customer is liable for the truth of the statements made thereon, and because the report is made and the records underlying it are kept not in the ordinary business practice of banks but under the coercion of the Act and Regulations. We argue here that appellees should be entitled to assert the rights of those customers.

We recognize at the outset the general rule that "constitutional rights are personal and may not be asserted vicariously." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 37 L. Ed. 2d 830, 839 (1973). But that rule is "self-imposed", *Eisenstadt* v. *Baird*, 405 U.S. 438, 444 (1972), and "only a rule of practice", *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953), and it may be and has frequently been suspended upon a showing of "weighty countervailing policies", *United States* v. *Raines*, 362 U.S. 17, 22 (1960). Several weighty and countervailing considerations in these appeals support suspension of that rule and allowance to appellees of the right to assert the constitutional rights of those engaging in transactions now required to be reported.

The most traditional reason for permitting assertion of the rights of others is the "reasonable likelihood" of direct economic injury to the litigant itself, *NAACP* v. *Alabama*, 357 U.S. 449, 459-60 (1958). See also *McGowan* v. *Maryland*,

366 U.S. 420, 430 (1961), in which the employee litigants were held entitled to assert the rights of others under the establishment clause of the First Amendment because of "direct economic injury"; and *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925), in which a private parochial school was accorded standing to assert the rights of parents and children not parties to the litigation in order that the school might receive "protection against arbitrary, unreasonable and unlawful interference with [its] patrons." The bank appellees have pleaded and proved, without denial, direct financial injury to themselves as a result of the reporting requirements.

Another traditional factor calling for relaxation of the general rule has been the difficulty or impossibility of assertion of the rights sought to be asserted by those to whom they belong. *Barrows, supra,* at 257; *NAACP* v. *Alabama, supra,* at 459. Any litigant who pleaded and proved that he had engaged and would engage in a reportable transaction would, as in *NAACP* v. *Alabama, supra,* by the very act of litigating sacrifice much of the confidentiality sought to be protected. Worse, he would likely be investigated for criminal activity by the Government, which regards such a transaction as "most likely to be indicative of questionable activity" (Gov't OB 39). Or the Government, in order to avoid the litigation, could grant such a litigant an exemption under the Act and thus end his controversy. The lack of a forum for resolving the controversy was one of the factors that motivated this Court to permit the assertion of rights by others in *Eisenstadt, supra,* at 446, in which those whose rights were asserted were not themselves subject to prosecution under the challenged law.

At bottom the standing requirement serves to ensure an adequately contested case or controversy, as indicated in *Barrows, supra,* at 255, and this Court has frequently relaxed the normal standing requirement where the relationship between the litigant and those whose rights the litigant sought to assert was sufficient to guarantee a fully adversary contest. Thus the employment relationship was found sufficient in *Truax* v. *Raich,* 239 U.S. 33 (1915); the "confidential relationship" between a married couple and a doctor and a Planned Parenthood advisor was found sufficient in *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965); and the relationship between the recipient of contraceptive foam and the "advocate" of her rights, who was willing to risk jail to assert those rights, was found to provide "an adequate incentive" to the litigant in *Eisenstadt, supra,* at 445-46. We submit there is no serious question in this case that it is a fully adversary contest between those with an "adequate incentive" to engage in it. This incentive is especially apparent because appellees here argue in their own appeal that the foreign reporting requirements which they attack —with unquestioned standing—are analytically and constitutionally indistinguishable from the domestic reporting requirements at issue here. See appellants' opening brief in No. 72-1196 at pp. 34-35.

A less traditional but important factor favoring relaxation of the traditional standing requirement is that the asserted lack of standing is the consequence of action taken by the Government appellants, probably with an eye to its effect on this litigation. Since by virtue of 31 C.F.R., §103.45, before it was amended, any bank customer was subject to reporting and therefore had standing to challenge it, the current standing question is one created during the litigation

by the Government itself by its act of amending Section 103.45. This Court ought not to permit questions of standing to be altered by the self-serving and voluntary acts of litigants with an interest in asserting lack of standing.

ARGUMENT

III.

The District Court's interpretation of the Act and Regulations was entirely consistent with their provisions.

The Government in its Opening Brief (hereafter "Gov't OB") condemns the District Court for ignoring the supposedly narrow limits of the domestic reporting requirements of the Act and Regulations and instead engaging in "speculation," Gov't OB 16, about the "conjectural outer limits of hypothetical regulations." *Id.* at 19. Saying that the District Court "entirely disregarded" the Regulations, the Government throughout this contention implies that the only domestic reporting requirement before the District Court concerned transactions involving $10,000 in currency.

This pretense is false, and the fact and chronology of its falsity thoroughly refute the Government's attack on the "conjecture" it ascribes to the District Court. The Government manages to make its entire argument on this point without even mentioning 31 C.F.R., §103.45 (1972), which at the time the District Court ruled permitted the Secretary "in his sole discretion" and "by written order or authorization . . . [to] impose additional . . . reporting requirements authorized by statute, or otherwise modify, the requirements" of any of the regulations. The District Court thus faced not only the currency reporting require-

ment of 31 C.F.R., §103.22(a), but also any reporting requirement that the Secretary might draft and impose, subject to immediate and severe civil and criminal sanctions, on anyone. The Government's professed astonishment, Gov't OB 19-20, that the District Court perceived reporting requirements of monetary instruments as well as currency and small amounts as well as large (App. 80) is a consequence of its tactic of ignoring the existence of Regulation 103.45, a tactic it has pursued throughout this litigation.

Regulation 103.45 was a central focus of attack in the District Court from the beginning of the litigation,[1] and was central to the District Court's reasoning and decision. As the District Court said:

> These reporting provisions of the Act must be considered along with other general provisions [relating to regulatory and exemptive authority]. The Secretary has broadly implemented these authorizations in his Regulation 103.45, providing that in his sole discretion he may by written order make exceptions or exemptions or impose additional record-keeping or reporting requirements authorized by the statute or otherwise modify the requirements of the regulations (App. 81).

Throughout the proceedings before the District Court the Government refused to commit a single word to paper concerning the meaning, intent, or effect of Regulation 103.45. On October 28, 1972, after the District Court had ruled and the Government had appealed, but before the Government filed its Jurisdictional Statement in this Court,

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[1] See, *e.g.*, Plaintiffs' Memorandum of Points and Authorities Re: Temporary Restraining Order (in *Stark*) at pp. 3, 10-11, 19, 21, 24-25, 45, 51.

the Secretary promulgated a notice of proposed rule making containing an amendment to Regulation 103.45, which deleted the express language permitting the Secretary to impose additional reporting requirements, 37 F.R. 23114 (1972).[2] Even then, the Government in its Jurisdictional Statement did not attempt to explain the previous meaning of Regulation 103.45; instead it merely noted the fact that the regulation had been amended (p. 22 n. 19).

Now, in a footnote in its opening brief (pp. 29-30, n. 16), remote from its attack on the District Court's "speculation," the Government has finally come to grips with the original meaning of Regulation 103.45 by confessing that "as originally promulgated [it] provided that the Secretary could by written order or authorization . . . expand by additional recordkeeping . . . requirements . . ." the entire regulatory scheme. Asserting without any authority, years after its drafting, that the original regulation was intended "merely . . . to allow the Secretary in appropriate cases to substitute one type of compliance for another—for example, to require lists of currency transactions rather than individual reports," the Government now suggests that the controversy is "moot" because the regulation has been amended.

The Government's tardy and strained interpretation of the original regulation deserves only brief mention because it is frivolous. The statute itself gives the Secretary power to "substitute one type of compliance for another" by requiring "such procedures as he may deem appropriate," 31 U.S.C., §1054(b), or by granting a conditional exemption

[2] The amendments were adopted effective January 17, 1973. See Government's Jurisdictional Statement at 111.

under 31 U.S.C., §1055, and even the amended regulation clearly gives the Secretary such power. The suggestion, therefore, that the "additional . . . requirements" language of the original regulation served so modest a purpose is wholly without substance. The language remains unexplained by the Government because its meaning is obvious —the secretary could, under the original regulation, require any new reports he wanted immediately. Thus the District Court's reading of the reporting requirements, far from being "premature" or "conjectural," was compelled by the law as it then read—unexplained and undefended by the Government.

There is nothing "moot" about the controversy over the legality of the reporting requirements, because banks still must report currency transactions exceeding $10,000 and the legal issues underlying that requirement are the same as those surrounding the original Regulation 103.45.[8]

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[8] Even if the sole issue on this appeal were the validity of the original Regulation 103.45 we would resist the suggestion of mootness because the Secretary's behavior in this case is precisely the "protestations of repentance and reform timed . . . to blunt the force of a lawsuit", *Lankford* v. *Gelston*, 364 F.2d 197, 203 (4th Cir. 1966), that have led this and other courts to reject claims of mootness when illegal conduct has been voluntarily abandoned with an eye toward pending litigation, leaving an underlying controversy unresolved. See, *e.g.*, *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Lankford, supra*. Moreover, the suggestion of mootness based upon change in the underlying law is appropriately made in the court below, not here. *Cf. United States* v. *Munsingwear*, 340 U.S. 36 (1950).

IV.

The "narrower construction" of the reporting requirements now urged by the Government is neither narrow nor relevant.

The Government in its second argument (Gov't OB 24-29) attacks the ruling of the District Court on the ground that the District Court's reading of the reporting requirements was "overly broad" and that a "narrower construction" is available. Taking exception to the District Court's suggestion (App. 80) that the reporting requirements could include any transaction, large or small, and even those involving personal checks, the Government argues that the Act and Regulations must be construed to require the reporting only of transactions in currency or "near currency."

Again in this contention the Government ignores the language of Regulation 103.45, which by itself gave the District Court ample reason to see such scope in the reporting requirements.

Upon examination, the "narrower construction" now offered by the Government is hardly any narrower than the one adopted by the District Court. The Government indicates, Gov't OB 26-27, that Congress intended to give the Secretary power to require reports not only of currency but also of any monetary instrument which " 'may substitute for currency.' " Congress therefore empowered the Secretary, in 31 U.S.C., §1052(l), not only to require reports of currency and numerous bearer instruments but also to require reports of "the equivalent thereof," a power that the Government asserts even extends to personal checks under some circumstances. At page 28, n. 13, the Government gives away most of its "narrower construction" by

anticipating the argument that a personal check may be used as a bearer instrument (for example, by making it out to "cash"), and reserves the right to include such checks in the reporting requirements: ". . . the Secretary might properly determine that such instruments constitute 'monetary instruments' for the purpose of some or all of the provisions of Title II." The only personal checks that the Secretary is currently willing to exclude are those "not drawn or used in such a way" as to become bearer instruments. Already, as the Government admits (Gov't OB 15), the form on which currency transactions must be reported demands information on any *check* involved in the transaction—whether it is "near currency" or not. See also Government's Jurisdictional Statement at 121.

In sum, the "narrower construction" of the reporting requirements urged by the Government admittedly embraces both currency and monetary instruments (except some personal checks of less then $10,000 in some circumstances) and is unlimited, as far as Congress is concerned, either in amount or in detail. While this reading of the statute certainly is consistent with its all-embracing language,[4] it hardly rescues the statute from constitutional attack. Nowhere in its second argument does the Government even attempt to explain why its "narrower construction" might yield any different constitutional result than that adopted by the District Court.

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[4] 31 U.S.C., §1081, which authorizes the reporting requirements, is drafted as broadly as language allows: the transactions may involve "any domestic financial institution", the reports must be made "at such time, in such manner, and in such detail" as the Secretary demands, and include currency "or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe."

V.

The reporting requirements of the Act and Regulations violate the Fourth Amendment.

The Government begins its constitutional defense of the reporting requirements (Gov't OB 29-42) by arguing that "even under the rationale of the district court" no Fourth Amendment right of bank customers is violated.[5] *Id.* at 29-30. Seizing upon the District Court's statement that, under existing law, a bank customer has no recognized right of privacy in "the bank's own records" (App. 84), the Government urges that the reporting requirements require only information from "'the bank's own records'" and that therefore no right of the customer is infringed. Gov't OB 30-31.

This argument is wrong both factually and legally. It was established by affidavit in the District Court that the $10,000 currency reporting requirement of 31 C.F.R. §103.22 (a) would require additional recordkeeping by banks.[6] The District Court used the phrase, "the bank's own records," in an obvious reference to records that the bank would

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[5] At footnote 14 on page 29 the Government asserts without reasoning or authority that the compulsion of reports "does not constitute a search and seizure, much less an unreasonable search and seizure." That argument is anticipated and refuted at pp. 30-31 of Appellants' Opening Brief in No. 72-1196. Rather than repeat that argument here we will await the government's response in No. 72-1196.

[6] See App. 19-20, in which in an affidavit the Senior Vice President and General Counsel of the Bank of America indicated that compliance with the $10,000 currency reporting requirement would force his bank to spend "additional sums of money for . . . record keeping equipment and material." This fact is nowhere denied by the Government.

make or keep in the ordinary course of business. The Government uses the phrase to embrace records that banks would not otherwise make or keep but which are forced upon them by the Act and Regulations.

The Act requires that the report "shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require." 31 U.S.C., §1082.[7] The same section requires any party not acting only for himself to disclose his principal. The Act defines the reports as "statements and representations" within the meaning of 18 U.S.C., §1001, which punishes false, fictitious and fraudulent statements by criminal sanction. See 31 U.S.C. §1052(k). A report required by law to be signed by the party to the transaction as well as the financial institution, the truth of which is guaranteed by the signator on pain of criminal penalty, is at the very least a joint product of both the party and the institution and can hardly be classified "a bank's own record."

The Secretary has implemented this statutory command by distributing a "Currency Transaction Report," which is appended to the Government's Jurisdictional Statement at pp. 121-26. The Report, as well as the Regulations,[8] require detailed identification of the party to the transaction, including his Social Security number and the number of his driver's license or other identifying document. Jurisdic-

[7] The phrase, "as the Secretary may require," in Section 1082 clearly gives the Secretary power to choose which and how many participants sign—not whether any sign at all. Congress, as the legislative history repeatedly shows, sought the customer's signature both for the purpose of giving notice and to establish liability for false statements. See *e.g.* House Report No. 91-975, 2 U.S. Code Cong. & Admin. News 4394, 4407 (1970). See also 31 U.S.C., Section 1052(k).

[8] See 31 C.F.R., §103.26.

tional Statement at 121. It is clearly a joint product of the institution and the party; the instructions to the institution require that the *party* enter his individual or organizational name, *id.* at 123, although other details may be gathered and from the party entered by employees of the institution.

It is doubtful that the Currency Transaction Report now promulgated by the Secretary complies with the mandate of 31 U.S.C., §1082, that the report "shall be signed or otherwise made" not only by the institution but also by one or more parties to the transaction. However, the Secretary's temporary dereliction in this respect hardly affects the outcome of this appeal; the law requires that the report be signed or otherwise made by the bank and the customer, and the customer is criminally liable if the report is false. The Government, therefore, has no basis whatever for asserting that the rights of the customer are unaffected and that "no seizure of any tangible or intangible property of the bank customer is involved" (Gov't OB 33).

The Government next argues (*id.*) that banks and bank customers have no reasonable expectation of privacy in the details of reportable transactions because the customer, by analogy to *United States* v. *White,* 401 U.S. 33 (1970), can have no "expectation that the other party to the conversation will not disclose the contents of the conversation . . . ." While there are numerous distinctions between this case and the cases dealing with the Fourth Amendment consequences of the communication of information from an informant to the police,[9] the central difference is that in this case the information is coerced from the bank,

[9] One such difference is that banks are bound by contract to respect the privacy of a customer's account. See Appellants' Opening Brief in No. 72-1196 at pp. 27-28.

whereas in *United States* v. *White* and its related cases the information is disclosed voluntarily. In *White* the informant concealed policemen in his house "with [his] consent," 401 U.S. at 747, and voluntarily caused the disclosures. This Court held, relying upon *Hoffa* v. *United States*, 385 U.S. 293 (1966), that the Fourth Amendment does not protect "'a wrongdoer's misplaced belief that a person to whom he *voluntarily* confides his wrongdoing will not reveal it.'" 401 U.S. at 749 (emphasis added).

The Government is quite right in asserting (Gov't OB 33-34) that a bank customer may not expect his bank to ignore "a grand jury subpoena or other lawful process." Nearly all reasonable expectations of privacy can be overcome by lawful process. The flaw in the reporting requirements of the Bank Secrecy Act, however, is precisely that they do *not* involve a summons, subpoena, or other lawful process, but instead coerce routine reports of usually innocent transactions without any prior judicial superintendance.

Finally,[19] the Government argues (Gov't OB 35-40) that the $10,000 reporting requirement is reasonable under the Fourth Amendment. This argument appears to rest upon previous experience with currency reporting under the Trading with the Enemy Act and the claim that the reports will be useful in combatting crime. Neither of those contentions makes the reporting requirements reasonable.

The Trading with the Enemy Act has nothing to do with the question of the reasonableness of the reporting require-

[19] The Government's arguments concerning the Fifth and First Amendment claims of appellees (Gov't OB 34-35; 41-42) have also been anticipated and discussed in Appellants' Opening Brief in No. 72-1196 at pp. 44-59; we will reserve our response for our reply brief in that appeal.

ments at issue here. The constitutionality of its reporting requirements has never, to our knowledge, been litigated. The information required by the Trading with the Enemy Act is reproduced at page 130 of the Government's Jurisdictional Statement; it is scanty in comparison to the Currency Transaction Report now required under the Bank Secrecy Act (see Gov't Jurisdictional Statement at 121-26). Far from being a joint product of the customer and the institution, the report required under the Trading with the Enemy Act was, according to the Secretary of the Treasury in 1959, "not [to] be divulged to the customers of the reporting institutions." *Id.* at 128. Most importantly, however, the determination of whether to report under the Trading with the Enemy Act was subjective and was to be made by the reporting institutions themselves. The Government twice describes the regulation as requiring a judgment about whether the transaction was "legitimate." [11] As the Government itself points out, the Bank Secrecy Act was enacted partly in order to shift the judgment of legitimacy from the reporting institutions to the Government by removing the subjective element of the old law and replacing it with "definite standards" (Gov't OB 39).

The balance of the Government's Fourth Amendment defense of the reporting requirements (Gov't OB 37-40) is nothing more than an argument that the reports will be "eminently useful" because they will sometimes disclose criminal activity. Relying on the legislative history, the Government points out that various criminal schemes involve large currency transactions and that therefore the reports can help to detect such schemes and to "supply

[11] See Jurisdictional Statement at 15; Gov't OB 12.

leads for determining which records should be summoned or subpoenaed." *Id.* at 40.

We do not deny that a few of the reports required by the Act may prove to be useful in investigating crime. We argue,[12] however, that the reporting requirements are unreasonable because they lack judicial supervision, are excessive in scope and are required without probable cause. The Government in its Opening Brief, does not address the warrant requirement; indeed, it appears to concede—as it must—that there is no probable cause to suspect crime in a reportable transaction (Gov't OB 38-39). The most the Government can say is that such a transaction

> . . . is most likely to be indicative of questionable activity. Indeed, it is difficult to see how the requirement could be drawn any more narrowly unless the burden of reporting were defined in terms of actual suspicion on the part of bank officials as to the legitimacy of the transaction. While overtly suspicious transactions might well be reported in any event, it is not ordinarily the province of bank officials to inquire as to the purpose of their customers' bank transactions . . . . *Id.* at 39.

Thus the Government apparently regards the transactions as less than "suspicious" but "likely" to be "questionable."

These are not the standards for searches which comply with the Fourth Amendment. A seizure admittedly intended to detect crime undertaken on less than probable cause violates that Amendment, and these seizures, according to the Government, are undertaken on even less than suspicion.

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[12] See Appellants' Opening Brief in No. 72-1196 at pp. 31-39.

We think it plain that seizures of documents concerning whole categories of transactions which the Government regards as "questionable" are impermissible under the Fourth Amendment.

CONCLUSION

For all of the aforementioned reasons, appellees urge this Court to affirm the partial preliminary injunction granted by the District Court.

Dated: January 4, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1196

FORTNEY H. STARK, JR., *et al.*,

Appellants,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

No. 72-1073

GEORGE P. SHULTZ, *et al.*,

Appellants,

—v.—

CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., *et al.*,

Appellees.

No. 72-985

CALIFORNIA BANKERS ASSOCIATION,

Appellant,

—v.—

GEORGE P. SHULTZ, *et al.*,

Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS FORTNEY H. STARK, JR., *ET AL.*

(Appellants in No. 72-1196)

I.

The Court should resist the Government's attempt to apply civil regulatory standards to criminal law enforcement legislation.

The differences between the private litigants and the Government are nowhere more apparent than in their respective treatments of the purpose of the Act, and the conclusions drawn from that purpose.

The axiom that a statute is to be construed in light of its purpose needs no citation. This Court has been divining and acting upon the real purpose of legislative acts—stated or not—since long before San Francisco outlawed wooden laundries. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). See also *Reitman* v. *Mulkey*, 387 U.S. 369, 373 (1967).

The central purpose of the Bank Secrecy Act is *criminal* law enforcement—a fact so clear that the Government does not directly deny it. Indeed, in its opening brief in its own appeal, the Government twice called criminal law enforcement "the purpose" of the Act (Gov't OB 9, 18).[1] But the Act cannot be defended when measured against the limitations appropriate to criminal law enforcement, so the Government in its brief in this appeal repeatedly seeks to disguise the Act in civil clothing, urging upon the Court constitutional standards appropriate to economic regulation.

In this effort the Government has even begun to confuse the subject matter of the Act. It suggests that the Act

[1] References to "Gov't AeB" herein are to the Government's Appellees' Brief in Nos. 72-985 and 72-1196; reference to "Gov't OB" are to the Government's Appellants' Brief in No. 72-1073.

helps "to eliminate the use of banking for unlawful activities" (Gov't AeB 10-11); it ventures that the Act provides "a deterrent to burdening the channels of foreign commerce with illegal conduct" (*id.* at 14); it calls a "collateral purpose" of the Act the use of information for "regulatory, tax and criminal" law enforcement (*ibid.*), thus inverting not only the purpose of the Act but even the order in which that purpose is stated.

The Government reaches the apogee of error when it asserts that the basic "activity" being "regulated" by the Act is not crime at all, but commercial banking (*id.* at 25):

> The "basic activity" regulated here—commercial banking transactions—is one which is affected with a public interest and subject to substantial regulation under numerous constitutional powers, including the Commerce Clause. Congress plainly has the authority to provide for the retention of records of these transactions to insure that the channels of interstate commerce are employed in a manner which will facilitate rather than jeopardize or hinder that enforcement of tax and criminal laws . . .

Thus, rather than directly taking issue with the fact that the Bank Secrecy Act is a statute intended to enforce criminal laws, the Government now confuses ends and means in order to support the application of civil standards to criminal law enforcement. Throughout its brief in this appeal, the Government suggests that the appropriate standards for judging the Act are whether Congress has chosen "appropriate means to achieve [a] legitimate end" (*id.* at 26), "whether the means are reasonably appropriate to the accomplishment of a legitimate legislative purpose"

(*id.* at 24-25), and whether the requirements of the Act are "reasonable" (*id.* at 68). These offered standards are everywhere accompanied by citations to and reliance upon decisions dealing only with civil regulation of economic activity. The Government's only serious attempt to distinguish *Boyd* v. *United States,* 116 U.S. 616 (1886), is to say that *Boyd* has no bearing on reports "required by an otherwise valid regulatory scheme . . . " (Gov't AeB 68, n. 41).

It makes no sense, we submit, to speak of an "activity" being "regulated" when the activity is crime, the regulation is prohibition, and the means chosen are those calculated to collect evidence of crime. It makes no more sense to speak of a legislative purpose of not "burdening" commerce with criminal activity than it does to speak of not "burdening" the telephone lines with conversations about crime, or not "burdening" the mails with letters about crime.

It is constitutionally disastrous, we think, to measure the collection of evidence of crime by the standards appropriate to the regulation of commerce. With all deference, we are confident that this Court would never permit the Government, in order to ferret out crimes, to force the telephone company to record calls pursuant to its "regulatory" power over the telephone system, or to search apartments in public housing projects for evidence of crime on the theory that the Government may "regulate" public housing. This Court has consistently recognized criminal law enforcement wherever it has appeared in civil clothing. See, e.g., *United States* v. *United States Coin & Currency,* 401 U.S. 715 (1970); *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965); *Boyd* v. *United States,* 116 U.S. 616 (1886).

There are undoubtedly some tangential benefits for civil law enforcement in the Bank Secrecy Act. But plainly its central, dominant, almost exclusive purpose—"the purpose", in the Government's own words (Gov't OB 9, 18)—is to enforce the criminal law. It is equally clear that the Bill of Rights and particularly the Fourth and Fifth Amendments, are nowhere more stringently applied—and rightly so—than to enforcement of the criminal law. As Mr. Justice Frankfurter eloquently put it in *Frank* v. *Maryland*, 359 U.S. 360 (1959) (*overruled, Camara* v. *Municipal Court*, 387 U.S. 523 (1967)):

> Against this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. Thus, *evidence of criminal action* may not, save in very limited and closely confined situations, be seized without a judicially issued search warrant.
>
> . . . Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for *evidence to be used in criminal*

prosecutions or for forfeitures that the great battle for fundamental liberty was fought.

359 U.S. at 365 (emphasis added; footnote omitted).

We therefore urge this Court to continue its historic resistance to executive attempts to clothe criminal law enforcement in civil robes and to justify it under regulatory standards—an invitation that permeates the Government's brief.

II.

The foreign reporting requirements of the Act violate the Fourth and Fifth Amendments.

A. *The Fourth Amendment*

The Government does not argue, for obvious reasons, that the Fourth Amendment claims of the appellants who must affirmatively report their foreign financial interests and transactions are premature. Nor does the Government seriously dispute that a seizure has occurred when such a report is coerced. Instead it brushes aside the entire problem by saying that since "important governmental powers and purposes" (Gov't AeB 67) were involved in the passage of this portion of the Act, the requirements are "reasonably designed to serve the legislative purpose" and therefore "present no Fourth Amendment problem."

To some extent this argument is a reference to the Government's exposition (*id.* at 50-56) of the history and purpose of the foreign reporting requirements. Apparently because "thousands" of foreign financial interests (*id.* at 52) involve illegality, it is somehow reasonable to demand the

details of them *all*, indiscriminately, even though the Government concedes that most such interests are wholly legitimate and innocent of wrongdoing (*id.* at 52, 66).

The Government also implies (Gov't AeB 62-63) that since Congress' power to regulate foreign commerce extends to prohibiting it, Congress may therefore condition the privilege of dealing in foreign commerce upon the disclosure of whatever information it wants. But this Court has thoroughly put to rest the obsolete notion that "privileges" can be conditioned upon a waiver of constitutional rights. See, e.g., *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

The Government argues that appellants' claim that "the Fourth Amendment prohibits any requiring of reports that is not subject to prior judicial supervision is refuted by all the authorities" (Gov't AeB 68). That overstates appellants' claim; the Fourth Amendment has long been understood not to require prior judicial supervision of required reports where those reports are needed to enforce a specific statutory scheme regulating the commercial activities of businesses, as in *Isbrandsen-Moller Co.* v. *United States*, 300 U.S. 139, 145 (1937); *Rodgers* v. *United States*, 138 F.2d 992, 996 (6th Cir. 1943); *Bartlett Frazier Co.* v. *Hyde*, 65 F.2d 350, 351-52 (7th Cir. 1933).[2] And it was decided long ago that the Fourth Amendment was not intended by the Framers to prevent the requiring of tax returns, a practice in effect when that Amendment was drafted. *Flint* v.

[2] As the Court observed in *Rodgers, supra*, "Unless the distinction between private records and papers and quasi-public records and papers is kept in mind in applying the Fourth Amendment, it will be difficult to regulate business subject to congressional intervention under the Constitution." 138 F.2d at 996.

Stone Tracy Co., 220 U.S. 107, 175 (1911). This common understanding is both the source of and the explanation for the Court's dictum in *Boyd, supra,* that:

> So also the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. 116 U.S. at 624.

The Government's suggestion that the reporting of the transportation of a monetary instrument across the border is "substantially similar to customs declarations" and its reliance upon the "settled law and practice that persons entering and leaving the country may be required to identify the items which they are importing or exporting" (Gov't AeB 62-63) have no application here, entirely aside from the fact that those practices are not in aid of criminal law enforcement but seek to limit imports to "effects which may be lawfully brought in," *Carroll* v. *United States,* 267 U.S. 132, 154 (1925). The report required of transporters of monetary instruments, which is reproduced as Appendix C to the Government's Motion to Affirm, requires far more and different information than any customs declaration ever has or could, including social security numbers, the fact of agency and the name, address and occupation of any principal, and for recipients, the identity of the person from whom the instrument was obtained. Nor must the reporting party cross the border himself in order to be liable to report—he could, in fact, use first class mail. Finally, the customs power is designed to screen out items the importing or exporting of which is *illegal* or *taxable*—and no one

argues here that it is illegal to send or receive monetary instruments across the border.

The Government next argues that no person who transports monetary instruments across the border has any reasonable expectation of privacy in his transactions because "similar" reports are frequently required for tax purposes (Gov't AeB 68, n. 42, and Motion to Affirm, Appendix A). It is not suggested that the validity of these requirements has been litigated, and it is not argued that they serve the purpose of gathering evidence of crime. The tax reporting requirements, which all seek information about the reporter's income or his business relationships with others (as distinct from the activities of third parties with persons unknown), serve a legitimate Congressional purpose which is 1) specific, 2) wholly regulatory and noncriminal, and 3) tiny in scope compared to the foreign reporting requirements at issue here.

Finally, the Government concludes (Gov't AeB 68-69) with an argument which illustrates both the poverty of its position and the immense danger of its reasoning: it argues that there is no reasonable expectation of privacy in reportable transactions because:

> . . . when one engages in activities subject to the plenary power of Congress, there can be no reasonable expectation of privacy with respect to the details of said transactions.

This astonishing assertion means, if it is correct, that *Berger* v. *New York,* 388 U.S. 41 (1967), *Katz* v. *United States,* 389 U.S. 347 (1967), and *United States* v. *United States District Court,* 407 U.S. 297 (1972), were all wrongly

decided, because the telephone system is very surely "subject to the plenary power of Congress." It means that there is no reasonable expectation of privacy in telegrams, first class mail, public toilets, anywhere on public property, in buses and airplanes, and in dozens of other situations because all of those activities are "subject to the plenary power of Congress." It means, in short, that wherever the plenary power of Congress begins, privacy ends. The argument is arrogant, frightening, and utterly without support in reason or precedent.

B. *The Fifth Amendment*

The Government argues that appellants' claim of violation of the self-incrimination clause of the Fifth Amendment is premature because the claim should await their prosecution for failure to report, and because self-incrimination is not pleaded (Gov't AeB 57-62).

In support of the first argument it is urged that the case is governed by *Communist Party* v. *SACB*, 367 U.S. 1 (1961), rather than by *Albertson* v. *SACB*, 382 U.S. 70 (1965). Yet in *Communist Party* the Court indicated that the claim of privilege was "contingent and conjectural," 367 U.S. at 106, because the officers of the party were under no duty to register unless and until the party refused, and because §14(b) of the Act provided that any order to register was not final until judicial review of the available administrative procedure was completed. Here there is no administrative procedure, and no judicial review; those appellants under the duty to report must do so or "[risk] serious punishments for refusing to do so." 382 U.S. at 76.

It is true that the affected appellants have not pleaded self-incrimination. In the peculiar circumstances of this

case it would be pointless to require them to do so, because this case is the *opposite* of *United States* v. *Sullivan*, 274 U.S. 259 (1927). There the Court perceived that questions asked of everyone for a noncriminal purpose could at least be partially answered in fulfillment of that purpose. See *Albertson, supra,* at 79. Here, the *only* specific purpose to be served is self-incrimination. It is the noncriminal use of the reports which is "contingent and conjectural"; their regulatory usefulness is wholly speculative at this point. The reports are demanded for "the purpose" (Gov't OB 9, 18) of incriminating the reporters. Where no other purpose is served, the reporters should be under no obligation to negate another purpose by pleading.

The Government's claim that the argument is premature because the appellants are most likely to be innocent of wrongdoing (Gov't AeB 61-62) is only a function of the massive overbreadth of the Act—it is in essence an argument that a scheme for the gathering of self-incriminating evidence cannot be attacked as self-incriminating because it is largely a failure; most of the hopefully incriminating evidence will turn out to be useless and irrelevant. This is undoubtedly so, and is for Fourth Amendment purposes an open admission of excessive scope. But for Fifth Amendment purposes it is only a plea of inefficiency—and evidence either incriminating or useless ought not to be compelled on the plea that it is probably useless.[3]

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[3] With respect to the reporting of interests in foreign financial accounts, the Government claims that reports can be compelled in order to enforce the tax law (Gov't AeB 63-64). Putting aside the fact that all of the legislative history to which the Government refers dealt with tax schemes that were clearly criminal—at the pleader's option of the Internal Revenue Service—then by the Government's own logic those reports could be required under 26 U.S.C. §6001, which broadly requires taxpayers to "render such statements" as are found necessary to enforce the tax laws. If the Government is right, the Bank Secrecy Act is superfluous in this respect.

The Government attempts to defeat appellants' self-incriminating argument by relying (Gov't AeB 65-67) on the "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1 (1948), as construed in *Grosso* v. *United States*, 390 U.S. 62, 67-68 (1968). The doctrine requires, as indicated in *Grosso*, that the inquiry be "essentially regulatory." The Government does not—and cannot—meet that test, so the Government retreats to the argument that since the reports are mostly useless and "wholly legitimate" (Gov't AeB 66), that somehow is the equivalent of a regulatory scheme. Nor does the Government argue that the records are "customarily kept"—it only asserts that "anyone who engages in such activities must necessarily keep records for various personal and business purposes," and then argues tautologically that such records can be required under *Shapiro* (Gov't AeB 65-66 and n. 40). The suggestion that all of the reports have " 'public aspects' which render them at least analogous to public documents," *Grosso, supra*, at 68, is another consequence of the incredible claim that anyone who deals in an area subject to Congressional regulation has no privacy therein.

The appellants with foreign financial interests are compelled either to report criminality or irrelevancies. Such a requirement should be held to violate the self-incrimination clause notwithstanding the fact that it will usually produce irrelevancies.

III.

The recordkeeping requirements of the Act offend the Fourth and Fifth Amendments.

Pointing out that "the only recordkeepers are the banks" (Gov't AeB 36), and asserting (*id.* at 32) that there will be "time enough" to challenge the recordkeeping requirements if and when records are subpoenaed, the Government urges that appellants' attack on the recordkeeping requirements of the Act is also premature.

The attack is certainly not premature if banks act as agents of the Government when they make or keep records they would not otherwise make or keep—the violation is complete, in that event, upon the act of making or keeping. The Government's main response[4] is to suggest (Gov't AeB 42-43) that, under *United States* v. *White,* 401 U.S. 745 (1971), and other cases involving informants willing to disclose, a customer's disclosures to his bank are "voluntary" disclosures to an agent and therefore not the subject of a search. In essence the argument is that the Government may condition the use of financial institutions

[4] Contrary to the Government's assertion (Gov't AeB 42 n. 23) that this argument reaches every record made by government, the argument reaches only records made under coercion, by private parties (*of course* the Social Security Administration is an agent of government!) for purposes of surveillance of third parties. The occasional tax laws (see the Government's Motion to Affirm, Appendix A) that require private entities to keep records concerning third parties demand information that relates either to the recordkeeper itself or to the civil regulation of the third party in his relationship to the recordkeeper. None demands information seeking the criminal conviction of the third party or fourth parties with whom the third deals. In the tax laws the recordkeeper is an involved party; under the Bank Secrecy Act it is merely an unwilling but strategically located spy.

upon the sacrifice of privacy and call that sacrifice "voluntary." This Court may judicially know that financial institutions are as central to American life as the telephone, to which the Government's theory would also apply, and that to equate their use with disclosure by willing informants is frivolous; it is to rob the term "voluntary" of all meaningful content. If the Government cannot condition a publicly offered benefit upon a waiver of constitutional rights, *Perry* v. *Sindermann, supra, a fortiori* it cannot impose such a condition upon private business essential to modern life.

Even if banks are not agents of government for these purposes, appellants' attack is not premature. When these actions were filed, the original Regulation 103.45 eliminated all possibility of prematurity.[5] The Government's suggestion of prematurity—that there will be "time enough" to litigate when process is served, is based upon three assumptions that range from dubious to false: that process will be served at all; that the customer with an incentive to litigate will be notified of the service of process in time to litigate; and that, under the Government's view of established rules of standing, there will be anything for the customer to litigate.

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[5] Hoping that this Court will ignore Regulation 103.45, the Government attempts to distinguish such cases as *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966), by noting three separate times (Gov't AeB 37, 38 and n. 20) that the Regulation was "never utilized," and by denying that it was modified in response to successful litigation by pretending that only the ACLU is appealing (*id.* at 38, n. 20). Regulation 103.45 was restrained and then enjoined by the District Court as part of the domestic reporting requirements from the invalidation of which the Government appeals (App. 42-43, 94-95); its use would have been a contempt.

Even the Government admits that the first assumption is frequently false; it admits that process is frequently unnecessary and will not disclaim an intent to continue soliciting the breach of a contract it does not dispute. All it will say is that the bank is free to say no (Gov't AeB 38 n. 19). The Government could hardly claim more; William S. Lynch, Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department told a Senate Subcommittee in 1972 that access by the FBI to bank records without process occurs "with some degree of frequency." Hearings before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency on Foreign Bank Secrecy (S. 3678), 91st Cong., 2d Sess. (hereafter "1972 Hearings") at 114-15. See also 1972 Hearings at 28, 119.

The second assumption—timely notice to the customer—is even more unrealistic; a representative of the American Bankers Association told the same Subcommittee that he could not name a single instance in which a customer had been notified, *id.* at 233, and representatives of the Justice Department and the Treasury are hard at work in Congress opposing legislation to require such notice on the ground that it would seriously impair criminal investigations. *Id.* at 52-53, 109.

The Government's own argument that it serves process only upon "a bank's own records" (Gov't OB 30-31), coupled with its reading of *Couch* v. *United States,* —— U.S. ——, 34 L. Ed.2d 548 (1973), and *Donaldson* v. *United States,* 400 U.S. 517 (1971) (see Gov't AeB 36 and 45, n.25), would deprive a bank customer of standing to litigate the issues raised here even if he had the opportunity to do so—an

argument that undercuts the third assumption of the Government's notion of prematurity.

Nor would a different reading of *Couch* and *Donaldson,* premised upon the private litigants' theory that a customer *has* litigable Fourth and Fifth Amendment rights in records which but for the Act would not be made or kept, serve to protect those rights. If a criminal defendant moved to suppress a copy of a check sought to be used against him, he would have to prove that, in ordinary business practice and but for the Act, the check would not have been copied at all, or not have been retained for law enforcement access. Since Title I of the Act in effect *abolished* ordinary business practice in that respect by dictating copying and retention practices, and since those practices were in flux due to rapid technological change, that burden of proof would be all but impossible to discharge.

Finally, the rights of customers cannot be protected by reliance upon the bank to contest process. The Security National Bank, unlike some, insists on process and does its best to notify customers of process. It can afford this action but it cannot afford to litigate every summons served upon it; nor has it any interest in doing so. This Court expressly noted the illusory protection afforded those subject to government curiosity supported by process served upon third parties in *Gravel* v. *United States,* 408 U.S. 606, 608 n.1 (1972). See also *United States Servicemen's Fund* v. *Eastland,* No. 71-2034, D.C. Cir., Aug. 30, 1973, Sl. Op. 15.

This action, therefore, is not only not premature but is also the only effective avenue for challenge to the record-keeping requirements of the Act.

As the Government said in its Jurisdictional Statement in its own appeal (p. 9):

> Although the court's injunction is preliminary in form, there are no disputed facts to be resolved, essentially only issues of law are involved, and there is no reason to believe the district court will not simply adhere to the opinion below for the purposes of a final decree.

We agree; the matter is ripe for decision now.

The Government offers only two responses to the merits of the bank customers' Fourth and Fifth Amendment claims: that no search is involved and no compulsion occurs when banks make and keep records they would not otherwise make or keep (Gov't AcB 43-45). But a bank check normally is transferred from maker to payee to the payee's bank to the maker's bank and returned to the payee in a few days or weeks at most; surely the photographing of the instrument is a search of it unless in disclosing its contents to a few the maker has disclosed its contents to the world—and to the Government. Even the Government does not argue that. And the "voluntary" choice, as indicated above, between dealing entirely in (nonreportable) cash and sacrificing privacy by banking is not "voluntary" at all—it is as much compulsion as the threat of confinement.

The Government does not even attempt to defend the recordkeeping requirements of the Act against an attack based upon the rules applicable to criminal investigations; it persists in the conclusory assertion that it is "reasonable" to copy billions of checks and other financial documents in the purported exercise of the Commerce Power. As indicated in Section I above, the Bank Secrecy Act is an exercise of the Police Power and is subject to different and more rigorous standards—standards the Government concededly cannot meet.

IV.

The appellant ACLU faces specific present and future injury from the coerced maintenance of its membership list by its bank—injury intolerable under the First Amendment.

The Government argues that any injury to the First Amendment rights of the appellant ACLU Foundation of Northern California is "subjective" and an inadequate basis for relief (Gov't AeB 45-49). The Government is apparently willing to concede that if a subpoena had issued for the ACLU's bank records, the requisite injury would be sufficiently imminent; but it characterizes anything short of that situation as mere allegations of a "subjective" chill.

But that argument rests upon two of the three erroneous assumptions explored above: that the appellant ACLU's bank records could not be obtained by government in the absence of process, and that the ACLU would be notified of the existence of process in time to litigate its validity.[6] We have indicated above, the Government admits that it engages on a grand scale in inspecting bank records without process, subject only to the reluctance of banks over which it has, as it incessantly claims, "plenary" regulatory power. The Government also quite openly takes advantage of the fact that most banks do not notify customers of process—it vigorously opposes any attempt to require such notification by law, and admits by its silence that such

[6] Apparently in view of *United States Servicemen's Fund, supra*, the Government makes no claim that appellant's bank would have a sufficient adversary interest in contesting process to make litigation by the ACLU unnecessary.

notification rarely occurs. These undisputed facts make hollow the implication that there will be "time enough" to resist process when it issues. At issue here is not "the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary . . . ", *Laird* v. *Tatum,* 408 U.S. 1, 10 (1972). At issue here is a well-known scheme for the nationwide manufacturing of lists of contributors to and members of controversial membership organizations such as the ACLU—lists that the Government cannot deny are available to it without process, without notice to the organization or its members, and without any opportunity for judicial measurement of any asserted compelling interest in the production of such lists. This, we believe, constitutes the threat of specific future harm, as well as present injury, contemplated by the Court in *Laird, supra.* The ACLU does not seek an "advisory opinion"; on the contrary, it seeks judicial protection from substantial danger to it and its members.

CONCLUSION

The order of the District Court, insofar as it declined to enjoin portions of the Bank Secrecy Act, should be reversed with directions to invalidate the statute in its entirety.

Dated: January 14, 1974.

Respectfully submitted,

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CALIFORNIA BANKERS ASSN. *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 72–985. Argued January 16, 1974—Decided April 1, 1974*

The Bank Secrecy Act of 1970, which was enacted following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in illegal activities, authorizes the Secretary of the Treasury to prescribe by regulation certain bank recordkeeping and reporting requirements, the Act's penalties attaching only upon violation of the regulations thus prescribed. (Unless otherwise indicated, references below to the Act also include the accompanying regulations.) The Act is designed to obtain financial information having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Title I of the Act requires financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments, and to keep records of certain other items. Title II requires the reporting to the Federal Government of certain foreign and domestic financial transactions. Title II, § 231, requires reports of the transportation of currency and specified instruments exceeding $5,000 into or out of the country, exception being made, *inter alia*, for banks and security dealers. Section 241 requires individuals with bank accounts or other relationships with foreign banks to provide specified information on a tax return form. Section 221 delegates to the Secretary of the Treasury the authority to require reports of transactions "if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify . . . ," § 222 providing that he may require such reports from the domestic financial institution involved, the parties to the transaction, or both, and § 223 providing that he may designate financial institu-

*Together with No. 72–1073, *Shultz, Secretary of the Treasury, et al.* v. *California Bankers Assn. et al.*; and No. 72–1196, *Stark et al.* v. *Shultz, Secretary of the Treasury, et al.*, also on appeal from the same court.

6. The regulations for the reporting by financial institutions of domestic financial transactions are reasonable and abridge no Fourth Amendment rights of such institutions, which are themselves parties to the transactions involved, since neither "incorporated nor unincorporated associations [have] an unqualified right to conduct their affairs in secret," *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652. Pp. 63–67.

7. The depositor plaintiffs, who do not allege engaging in the type of $10,000 domestic currency transaction requiring reporting, lack standing to challenge the domestic reporting regulations. It is therefore unnecessary to consider contentions made by the bank and depositor plaintiffs that the regulations are constitutionally defective because they do not require the financial institution to notify the customer that a report will be filed concerning the domestic currency transaction. Pp. 67–70.

8. The depositor plaintiffs who are parties in this litigation are premature in challenging the foreign and domestic reporting provisions under the Fifth Amendment. Pp. 72–75.

(a) Since those plaintiffs merely allege that they intend to engage in foreign currency transactions with foreign banks and make no additional allegation that any of the information required by the Secretary will tend to incriminate them, their challenge to the foreign reporting requirements cannot be considered at this time. *Communist Party* v. *SACB*, 367 U. S. 1, 105–110, followed; *Albertson* v. *SACB*, 382 U. S. 70, distinguished. Pp. 72–74.

(b) The depositor plaintiffs' challenge to the domestic reporting requirements are similarly premature, since there is no allegation that any depositor engaged in a $10,000 domestic transaction with a bank that the latter was required to report and no allegation that any bank report would contain information incriminating any depositor. *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 62; and *Haynes* v. *United States*, 390 U. S. 85, distinguished. P. 75.

9. The bank plaintiffs cannot vicariously assert Fifth Amendment claims on behalf of their depositors under the circumstances present here, since the depositors cannot assert those claims themselves at this time. See par. 8, *supra*. Pp. 71–72.

10. The contentions of the ACLU that the reporting requirements with respect to foreign and domestic transactions invade its First Amendment associational interests are too speculative and hypothetical to warrant consideration, in view of the fact that the ACLU alleged only that it maintains accounts at a San

Francisco bank but not that it regularly engages in abnormally large domestic currency transactions, transports or receives monetary instruments from foreign commercial channels, or maintains foreign bank accounts. Pp. 75–76.

347 F. Supp. 1242, affirmed in part, reversed in part, and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 78. DOUGLAS, J., filed a dissenting opinion, in Parts I and II–A of which BRENNAN, J., joined, *post*, p. 79. BRENNAN, J., *post*, p. 91, and MARSHALL, J., *post*, p. 93, filed dissenting opinions.

John H. Anderson argued the cause for the California Bankers Assn., appellant in No. 72–985 and appellee in No. 72–1073. With him on the briefs was *Frederick M. Pownall.*

Charles C. Marson argued the cause for Stark et al., appellants in No. 72–1196 and appellees in No. 72–1073. With him on the briefs were *Joseph Remcho, Neil Horton, Anthony G. Amsterdam, Melvin L. Wulf, Burt Neuborne,* and *Hope Eastman.*

Deputy Solicitor General Wallace argued the cause for Shultz et al., appellants in No. 72–1073 and appellees in Nos. 72–985 and 72–1196. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Crampton, Edward R. Korman,* and *Leonard J. Henzke, Jr.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

These appeals present questions concerning the constitutionality of the so-called Bank Secrecy Act of 1970, and the implementing regulations promulgated thereunder by the Secretary of the Treasury. The Act, Pub. L. 91–508, 84 Stat. 1114, 12 U. S. C. §§ 1829b, 1730d,

1951–1959, and 31 U. S. C. §§ 1051–1062, 1081–1083, 1101–1105, 1121–1122, was enacted by Congress in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability. Under the Act, the Secretary of the Treasury is authorized to prescribe by regulation certain recordkeeping and reporting requirements for banks and other financial institutions in this country. Because it has a bearing on our treatment of some of the issues raised by the parties, we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone.

The express purpose of the Act is to require the maintenance of records, and the making of certain reports, which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. §§ 1829b (a)(2), 1951; 31 U. S. C. § 1051. Congress was apparently concerned with two major problems in connection with the enforcement of the regulatory, tax, and criminal laws of the United States.[1]

First, there was a need to insure that domestic banks and financial institutions continued to maintain adequate records of their financial transactions with their customers. Congress found that the recent growth of financial institutions in the United States had been paralleled by an increase in criminal activity which made use of

[1] See generally S. Rep. No. 91-1139 (1970); H. R. Rep. No. 91-975 (1970); Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess. (1969–1970); Hearings on Foreign Bank Secrecy (S. 3678 and H. R. 15073) before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. (1970).

these institutions. While many of the records which the Secretary by regulation ultimately required to be kept had been traditionally maintained by the voluntary action of many domestic financial institutions, Congress noted that in recent years some larger banks had abolished or limited the practice of photocopying checks, drafts, and similar instruments drawn on them and presented for payment. The absence of such records, whether through failure to make them in the first instance or through failure to retain them, was thought to seriously impair the ability of the Federal Government to enforce the myriad criminal, tax, and regulatory provisions of laws which Congress had enacted. At the same time, it was recognized by Congress that such required records would "not be made automatically available for law enforcement purposes [but could] only be obtained through existing legal process." H. R. Rep. No. 91–975, p. 10 (1970); see S. Rep. No. 91–1139, p. 5 (1970).

In addition, Congress felt that there were situations where the deposit and withdrawal of large amounts of currency or of monetary instruments which were the equivalent of currency should be actually reported to the Government. While reports of this nature had been required by previous regulations issued by the Treasury Department, it was felt that more precise and detailed reporting requirements were needed. The Secretary was therefore authorized to require the reporting of what may be described as large domestic financial transactions in currency or its equivalent.

Second, Congress was concerned about a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments. The House

Report on the bill, No. 91–975, *supra*, at 12–13, described the situation in these words:

> "Considerable testimony was received by the Committee from the Justice Department, the United States Attorney for the Southern District of New York, the Treasury Department, the Internal Revenue Service, the Securities and Exchange Commission, the Defense Department and the Agency for International Development about serious and widespread use of foreign financial facilities located in secrecy jurisdictions for the purpose of violating American law. Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracies to steal from the U. S. defense and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies.
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> . . . . .
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> "The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. Unwarranted and unwanted credit is being pumped into

our markets. There have been some cases of corporation directors, officers and employees who, through deceit and violation of law, enriched themselves or endangered the financial soundness of their companies to the detriment of their stockholders. Criminals engaged in illegal gambling, skimming, and narcotics traffic are operating their financial affairs with an impunity that approaches statutory exemption.

"When law enforcement personnel are confronted with the secret foreign bank account or the secret financial institution they are placed in an impossible position. In order to receive evidence and testimony regarding activities in the secrecy jurisdiction they must subject themselves to a time consuming and ofttimes fruitless foreign legal process. Even when procedural obstacles are overcome, the foreign jurisdictions rigidly enforce their secrecy laws against their own domestic institutions and employees.

"One of the most damaging effects of an American's use of secret foreign financial facilities is its undermining of the fairness of our tax laws. Secret foreign financial facilities, particularly in Switzerland, are available only to the wealthy. To open a secret Swiss account normally requires a substantial deposit, but such an account offers a convenient means of evading U. S. taxes. In these days when the citizens of this country are crying out for tax reform and relief, it is grossly unfair to leave the secret foreign bank account open as a convenient avenue of tax evasion. The former U. S. Attorney for the Southern District of New York has characterized the secret foreign bank account as the largest single tax loophole permitted by American law."

While most of the recordkeeping requirements imposed

by the Secretary under the Act merely require the banks to keep records which most of them had in the past voluntarily kept and retained, and while much of the required reporting of domestic transactions had been required by earlier Treasury regulations in effect for nearly 30 years,[2] there is no denying the impressive sweep of the authority conferred upon the Secretary of the Treasury by the Bank Secrecy Act of 1970. While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the heavy utilization of our domestic banking system by the minions of organized crime as well as by millions of legitimate businessmen. The challenges made here to the Bank Secrecy Act are directed not to any want of legislative authority in Congress to treat the subject, but instead to the Act's asserted violation of specific constitutional prohibitions.

I

Title I of the Act, and the implementing regulations promulgated thereunder by the Secretary of the Treasury, require financial institutions to maintain records of the identities of their customers, to make microfilm copies of certain checks drawn on them, and to keep records of certain other items. Title II of the Act and its implementing regulations require reports of certain domestic and foreign currency transactions.

A. Title I—The Recordkeeping Requirements

Title I of the Bank Secrecy Act contains the general recordkeeping requirements for banks and other

[2] See n. 11, *infra*.

financial institutions, as provided by the Secretary by regulation. Section 101 of the Act, 12 U. S. C. § 1829b, applies by its terms only to federally insured banks. It contains congressional findings "that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." The major requirements of the section are that insured banks record the identities of persons having accounts with them and of persons having signature authority thereover, in such form as the Secretary may require. To the extent that the Secretary determines by regulation that such records would have the requisite "high degree of usefulness," the banks must make and maintain microfilm or other reproductions of each check, draft, or other instrument drawn on it and presented to it for payment, and must maintain a record of each check, draft, or other instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected. Section 101 further authorizes the Secretary to require insured banks to maintain a record of the identity of all individuals who engage in transactions which are reportable by the bank under Title II of the Act, and authorizes the Secretary to prescribe the required retention period for such records. Section 102, 12 U. S. C. § 1730d, amends the National Housing Act to authorize the Secretary to apply similar recordkeeping requirements to institutions insured thereunder. Sections 122 and 123 of the Act, 12 U. S. C. §§ 1952–1953, authorize the Secretary to issue regulations applying similar recordkeeping requirements to additional domestic financial institutions.[3]

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[3] Under § 123 (b), the authority of the Secretary extends to any person engaging in the business of:

"(1) Issuing or redeeming checks, money orders, travelers' checks,

Although an initial draft of Title I, see H. R. 15073, 91st Cong., 1st Sess., would have compelled the Secretary of the Treasury to promulgate regulations requiring banks to maintain copies of all items received for collection or presented for payment, the Act as finally passed required the maintenance only of such records and microfilm copies as the Secretary determined to have a "high degree of usefulness."[4] Upon passage of the Act, the Treasury Department established a task force which consulted with representatives from financial institutions, trade associations, and governmental agencies to determine the type of records which should be maintained. Whereas the original regulations promulgated by the Secretary of Treasury had required the copying of all checks, the task force decided, and the regulations were accordingly amended, to require check copying only as to checks in excess of $100.[5] The regulations also require

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or similar instruments, except as an incident to the conduct of its own nonfinancial business.

"(2) Transferring funds or credits domestically or internationally.

"(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

"(4) Operating a credit card system.

"(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations."

Section 122 of the Act, 12 U. S. C. § 1952, authorizes the Secretary to require reports with respect to the ownership, control, and management of uninsured domestic financial institutions.

[4] See House Hearings, *supra*, n. 1, at 60–61, 80, 146, 162, 314, 316, 321, 333; S. Rep. No. 91–1139, *supra*, at 18–19 (supplemental views).

[5] For a summary of the task force study, see Hearings to amend the Bank Secrecy Act (S. 3814 and S. 3828) before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., 60–64 (1972). The Secretary of the Treasury initially issued regulations on April 5, 1972, implementing the provisions of the Act. See 31 CFR Part 103 (37 Fed.

the copying of only "on us" checks: checks drawn on the bank or issued and payable by it. 31 CFR § 103.34 (b)(3). The regulations exempt from the copying requirements certain "on us" checks such as dividend, payroll, and employee benefit checks, provided they are drawn on an account expected to average at least one hundred checks per month.[6] The regulations also require banks to maintain records of the identity and taxpayer identification number of each person maintaining a financial interest in each deposit or share account opened after June 30, 1972, and to microfilm various other financial documents. 31 CFR § 103.34.[7] In addition, the

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Reg. 6912). The Treasury Department task force found that law enforcement would not be greatly impaired by limiting the check-copying requirement to checks in excess of $100. An Assistant Secretary of the Treasury estimated that this exclusion would eliminate 90% of all personal checks from the microfilming requirement. Senate Hearings on S. 3814, *supra*, at 42, 44, 57–58. The regulations were thus amended shortly after their promulgation to exclude the copying of checks drawn for $100 or less. 31 CFR § 103.34 (b)(3), as amended, 37 Fed. Reg. 23114 (1972), 38 Fed. Reg. 2174 (1973), effective Jan. 17, 1973.

[6] Exempted by 31 CFR § 103.34 (b)(3) are dividend checks, payroll checks, employee benefit checks, insurance claim checks, medical benefit checks, checks drawn on governmental agency accounts, checks drawn by brokers or dealers in securities, checks drawn on fiduciary accounts, checks drawn on other financial institutions, and pension or annuity checks, provided they are drawn on an account expected to average at least one hundred checks per month.

[7] Title 31 CFR § 103.34 (b) requires that each bank retain either the original or a microfilm or other copy or reproduction of (1) documents granting signature authority over accounts; (2) statements or ledger cards showing transactions in each account; (3) each item involving more than $10,000 remitted or transferred to a person, account, or place outside the United States; (4) a record of each remittance or transaction of funds, currency, monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States; (5) each check

Secretary's regulations require all financial institutions to maintain a microfilm or other copy of each extension of credit in an amount exceeding $5,000 except those secured by interest in real property, and to microfilm each advice, request, or instruction given or received regarding the transfer of funds, currency, or other money or credit in amounts exceeding $10,000 to a person, account, or place outside the United States. 31 CFR § 103.33.

Reiterating the stated intent of the Congress, see, *e. g.*, H. R. Rep. No. 91–975, *supra*, at 10; S. Rep. No. 91–1139, *supra*, at 5, the regulations provide that inspection, review, or access to the records required by the Act to be maintained is governed by existing legal process. 31 CFR § 103.51.[8] Finally, §§ 125–127 of the Act provide

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or draft in an amount exceeding $10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a nonbank drawee for payment; (6) each item of more than $10,000 received directly from a bank, broker, or dealer in foreign exchange outside the United States; (7) a record of each receipt of currency, monetary instruments, checks, or investment securities, and each transfer of funds or credit in amounts exceeding $10,000 received directly from a bank, broker, or dealer in foreign exchange outside the United States; (8) records needed to reconstruct a demand deposit account and to trace checks in excess of $100 deposited in such account.

Title 31 CFR § 103.35 requires brokers and dealers in securities to maintain similar information with respect to their brokerage accounts.

The prescribed retention period for all records under the regulations is five years, except for the records required for reconstructing a demand deposit account, which must be retained for only two years. 31 CFR § 103.36 (c).

[8] Title 31 CFR § 103.51 provides:

"Except as provided in §§ 103.34 (a)(1) and 103.35 (a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review

for civil and criminal penalties for willful violations of the recordkeeping requirements. 12 U. S. C. §§ 1955–1957.

B. Title II—Foreign Financial Transaction Reporting Requirements

Chapter 3 of Title II of the Bank Secrecy Act and the regulations promulgated thereunder generally require persons to report the transportation of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the transportation or receipt involves instruments of a value greater than $5,000. Chapter 4 of Title II of the Act and the implementing regulations generally require United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions. The legislative history of the foreign-transaction reporting provisions indicates that the Congress was concerned with the circumvention of United States regulatory, tax, and criminal laws which United States citizens and residents were accomplishing through the medium of secret foreign bank transactions. S. Rep. No. 91–1139, *supra*, at 7; H. R. Rep. No. 91–975, *supra*, at 13.

Section 231 of the Act, 31 U. S. C. § 1101, requires anyone connected with the transaction to report, in the manner prescribed by the Secretary, the transportation into or out of the country of monetary instruments[9] exceeding $5,000 on any one occasion. As

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the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law."

This regulation became effective January 17, 1973. 37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973).

[9] "Monetary instrument" is defined by § 203 (l) of the Act as "coin and currency of the United States, and in addition, such

provided by the Secretary's regulations, the report must include information as to the amount of the instrument, the date of receipt, the form of instrument, and the person from whom it was received. See 31 CFR §§ 103.23, 103.25.[10] The regulations exempt various classes of persons from this reporting requirement, including banks, brokers or dealers in securities, common carriers, and others engaged in the business of transporting currency for banks. 31 CFR § 103.23 (c). Monetary instruments which are transported without the filing of a required report, or with a materially erroneous report, are subject to forfeiture under § 232 of the Act, 31 U. S. C. § 1102; a person who has failed to file the required report or who has filed a false report is subject to civil penalties under §§ 207 and 233, 31 U. S. C. §§ 1056, 1103, as well as criminal penalties under §§ 209 and 210, 31 U. S. C. §§ 1058–1059.

Section 241 of the Act, 31 U. S. C. § 1121, authorizes the Secretary to prescribe regulations requiring residents and citizens of the United States, as well as nonresidents in the United States and doing business therein, to maintain records and file reports with respect to their trans-

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foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates." 31 U. S. C. § 1052 (*l*).

[10] The form provided by the Treasury Department for the reporting of these transactions is Form 4790 (Report of International Transportation of Currency or Monetary Instruments). See Motion to Affirm on behalf of the United States in No. 72–985, App. C, pp. 29–30. The report must identify the person required to file the report, his capacity, and the identity of persons for whom he acts, and must specify the amounts and types of monetary instruments, the method of transportation, and, if applicable, the name of the person from whom the shipment was received.

actions and relationships with foreign financial agencies. Pursuant to this authority, the regulations require each person subject to the jurisdiction of the United States to make a report on yearly tax returns of any "financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country." 31 CFR § 103.24. Violations of the reporting requirement of § 241 as implemented by the regulations are also subject to civil and criminal penalties under §§ 207, 209, and 210 of the Act, 31 U. S. C. §§ 1056, 1058–1059.

C. Title II—Domestic Financial Transaction Reporting Requirements

In addition to the foreign transaction reporting requirements discussed above, Title II of the Bank Secrecy Act provides for certain reports of domestic transactions where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. Prior to the enactment of the Bank Secrecy Act, financial institutions had been providing reports of their customers' large currency transactions pursuant to regulations promulgated by the Secretary of Treasury [11] which had required reports of all currency transactions that, in the judgment of the institution, exceeded those "commensurate with the customary conduct of the business, industry or profession of the person or organization concerned." [12] In passing the Bank

[11] In issuing these regulations, the Secretary relied upon the authority of two statutory provisions: (1) the Trading with the Enemy Act, 40 Stat. 411, as amended by § 2, Act of Mar. 9, 1933, 48 Stat. 1, and by § 301, First War Powers Act, 1941, 55 Stat. 839, see 12 U. S. C. § 95a (1940 ed., Supp. V); and (2) § 251 of the Revised Statutes, 31 U. S. C. § 427.

[12] The previous regulations promulgated by the Secretary, see 31 CFR § 102.1 (1949), 10 Fed. Reg. 6556, originally mentioned transactions involving $1,000 or more in denominations of $50 or

Secrecy Act, Congress recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanisms of the United States, had markedly increased. H. R. Rep. No. 91–975, *supra*, at 10; S. Rep. No. 91–1139, *supra*, at 2–3. Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports. H. R. Rep. No. 91–975, *supra*, at 11–12. In particular, Congress intended to authorize more definite standards for determining what constitutes the type of unusual transaction that should be reported. S. Rep. No. 91–1139, *supra*, at 6.

Section 221 of the Bank Secrecy Act, 31 U. S. C. § 1081, therefore delegates to the Secretary of the Treasury the authority for specifying the currency transactions which should be reported, "if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify." Section 222 of the Act, 31 U. S. C. § 1082, provides that the Secretary may require such reports from the domestic financial institution involved or the parties to the transactions or both.[13] Section 223 of the Act, 31 U. S. C. § 1083, authorizes the Secretary to designate financial institutions to receive such reports.

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more, or $10,000 or more in any denominations. In 1952, the former amount was raised to $2,500 in denominations of $100 or more. See 17 Fed. Reg. 1822, 2306. When these regulations were revised in 1959 to simplify the reporting form, the Secretary noted the great value of the reports to law enforcement. See Treasury Release No. A–590, Aug. 3, 1959, included in the Jurisdictional Statement for the United States in No. 72–1073, App. E, pp. 127–130.

[13] The proper interpretation of this section is a source of dispute in these appeals. See n. 29, *infra*.

In the implementing regulations promulgated under this authority, the Secretary of the Treasury has required only that financial institutions file certain reports with the Commissioner of Internal Revenue. The regulations require that a report be made for each deposit, withdrawal, exchange of currency,[14] or other payment or transfer "which involves a transaction in currency of more than $10,000." 31 CFR § 103.22.[15] The regulations exempt from the reporting requirement certain intrabank transactions and "transactions with an established customer maintaining a deposit relationship [in amounts] commensurate with the customary conduct of the business, industry, or profession of the customer con-

[14] "Currency" is defined in the Secretary's regulations as the "coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U. S. silver certificates, U. S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money." 31 CFR § 103.11.

[15] The form prescribed by the Secretary, see 31 CFR § 103.25 (a), for the reporting of the domestic currency transactions is Treasury Form 4789 (Currency Transaction Report). See Jurisdictional Statement for the United States in No. 72–1073, App. D, p. 121. Form 4789 requires information similar to that required by the previous Treasury reporting form, see n. 12, *supra*, including (1) the name, address, business or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted; (3) a summary description of the nature of the transaction, the type, amount, and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented; and (5) the identity of the reporting financial institution.

The regulations also provide that the names of all customers whose currency transactions in excess of $10,000 are not reported on Form 4789 must be reported to the Secretary on demand. 31 CFR § 103.22.

cerned." *Ibid.*[16] Provision is also made in the regulations whereby information obtained by the Secretary of the Treasury may in some instances and in confidence be available to other departments or agencies of the United States. 31 CFR § 103.43; see 31 U. S. C. § 1061.[17] There is also provision made in the regulations whereby the Secretary may in his sole discretion make exceptions to or grant exemptions from the requirements of the regulation. 31 CFR § 103.45 (a).[18] Failure to file the

[16] Transactions with Federal Reserve Banks or Federal Home Loan Banks, or solely with or originated by financial institutions or foreign banks, are also excluded from these reporting requirements. 31 CFR § 103.22.

[17] Section 212 of the Act, 31 U. S. C. § 1061, authorizes the Secretary to provide by regulation for the availability of information provided in the reports required by the Act to other departments and agencies of the Federal Government. Pursuant to this authority, the Secretary has promulgated 31 CFR § 103.43, which provides:

"The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought."

The last sentence of this regulation was added by an amendment, see 37 Fed. Reg. 23114 (1972), 38 Fed. Reg. 2174 (1973), effective Jan. 17, 1973.

[18] Title 31 CFR § 103.45 (a) provides:

"The Secretary, in his sole discretion, may by written order or authorization make exceptions to or grant exemptions from the requirements of this part. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as

required report or the filing of a false report subjects the banks to criminal and civil penalties. 31 U. S. C. §§ 1056, 1058, 1059.

II

This litigation began in June 1972 in the United States District Court for the Northern District of California. Various plaintiffs applied for a temporary restraining order prohibiting the defendants, including the Secretary of the Treasury and heads of other federal agencies, from enforcing the provisions of the Bank Secrecy Act, enacted by Congress on October 26, 1970, and thereafter implemented by the Treasury Regulations. The plaintiffs below included several named individual bank customers, the Security National Bank, the California Bankers Association, and the American Civil Liberties Union (ACLU), suing on behalf of itself and its various bank customer members.

The plaintiffs' principal contention in the District Court was that the Act and the regulations were violative of the Fourth Amendment's guarantee against unreasonable search and seizure. The complaints also alleged that the Act violated the First, Fifth, Ninth, Tenth, and Fourteenth Amendments. The District Court issued a temporary restraining order enjoining the enforcement of the foreign and domestic reporting provisions of Title II of the Act, and requested the convening of a three-judge court pursuant to 28 U. S. C. § 2284 to entertain the myriad of constitutional challenges to the Act.

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expressly stated in the order of authorization, and they shall be revocable in the sole discretion of the Secretary."

When originally promulgated, this regulation additionally gave the Secretary the authority to "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of" the Act. 37 Fed. Reg. 6915 (1972). The amendment to the present form became effective January 17, 1973. 37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973).

The three-judge District Court unanimously upheld the constitutionality of the recordkeeping requirements of Title I of the Act and the accompanying regulations, and the requirements of Title II of the Act and the regulations for reports concerning the import and export of currency and monetary instruments and relationships with foreign financial institutions. The District Court concluded, however, with one judge dissenting, that the domestic reporting provisions of §§ 221–223 of Title II of the Act, 31 U. S. C. §§ 1081–1083, were repugnant to the Fourth Amendment of the Constitution. 347 F. Supp. 1242 (1972). The court held that since the domestic reporting provisions of the Act permitted the Secretary of the Treasury to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts, and since the Act could conceivably be administered in such a manner as to compel disclosure of all details of a customer's financial affairs, the domestic reporting provisions must fall as facially violative of the Fourth Amendment. Their enforcement was enjoined.

Both the plaintiffs and the Government defendants filed timely notices of appeal from the portions of the District Court judgment adverse to them. We noted probable jurisdiction over three separate appeals from the decision below pursuant to 28 U. S. C. §§ 1252 and 1253. 414 U. S. 816 (1973):

No. 72–985. The appellant in this appeal is the California Bankers Association, an association of all state and national banks doing business in California. The Association challenges the constitutionality of the recordkeeping provisions of Title I, as implemented by the regulations, on two grounds. First, the Association contends that the Act violates the Due Process Clause of the Fifth Amendment because there is no rational rela-

tionship between the objectives of the Act and the recordkeeping required, and because the Act places an unreasonable burden on the Association's member banks. Second, the Association contends that the recordkeeping requirements of Title I violate the First Amendment right of privacy and anonymity of the member banks' customers.

No. 72–1196. This appeal was filed on behalf of a number of plaintiffs in the original suit in the District Court: on behalf of the Security National Bank, on behalf of the American Civil Liberties Union as a depositor in a bank subject to the recordkeeping requirements and as a representative of its bank customer members, and on behalf of certain bank customers. The appeal first challenges the constitutionality of the recordkeeping requirements of Title I of the Act and the implementing regulations, as does the appeal in No. 72–985, *supra*. Second, the appeal challenges the constitutionality of the foreign financial transaction reporting requirements of Title II of the Act and the implementing regulations. These recordkeeping and foreign reporting requirements are challenged on three grounds: first, that the requirements constitute an unreasonable search and seizure in violation of the Fourth Amendment; second, that the requirements constitute a coerced creation and retention of documents in violation of the Fifth Amendment privilege against compulsory self-incrimination; and third, that the requirements violate the First Amendment rights of free speech and free association.

No. 72–1073. In this appeal, the Secretary of the Treasury, as appellant, challenges that portion of the District Court's order holding the domestic financial transaction reporting requirements of Title II to violate the Fourth Amendment. The Government contends that the District Court erred in holding these provisions of Title II to

be unconstitutional on their face, without considering the actual implementation of the statute by the Treasury Regulations. The Government urges that since only those who violate these regulations may incur civil or criminal penalties, it is the actual regulations issued by the Secretary of the Treasury, and not the broad authorizing language of the statute, which are to be tested against the standards of the Fourth Amendment; and that when so tested they are valid.

For convenience, we will refer throughout the remainder of this opinion to the District Court plaintiffs as plaintiffs, since they are both appellants and appellees in the appeals filed in this Court.

III

We entertain serious doubt as to the standing of the plaintiff California Bankers Association to litigate the claims which it asserts here. Its complaint alleged that it is an unincorporated association consisting of 158 state and national banks doing business in California. So far as appears from the complaint, the Association is not in any way engaged in the banking business, and is not even subject to the Secretary's regulations which it challenges. While the District Court found that the Association sued on behalf of its member banks, the Association's complaint contains no such allegation. The Association seeks to litigate, not only claims on behalf of its member banks, but also claims of injury to the depositors of its member banks. Since the Government has not questioned the standing of the Association to litigate the claims peculiar to banks, and more importantly since plaintiff Security National Bank has standing as an affected bank, and therefore determination of the Association's standing would in no way avoid resolution of any constitutional issues, we assume without deciding that

the Association does have standing. See *Doe* v. *Bolton*, 410 U. S. 179, 189 (1973); *Sierra Club* v. *Morton*, 405 U. S. 727, 739 (1972); *NAACP* v. *Button*, 371 U. S. 415, 428 (1963).

We proceed then to consider the initial contention of the bank plaintiffs that the recordkeeping requirements imposed by the Secretary's regulations under the authority of Title I deprive the banks of due process by imposing unreasonable burdens upon them, and by seeking to make the banks the agents of the Government in surveillance of its citizens. Such recordkeeping requirements are scarcely a novelty. The Internal Revenue Code, for example, contains a general authorization to the Secretary of the Treasury to prescribe by regulation records to be kept by both business and individual taxpayers, 26 U. S. C. § 6001, which has been implemented by the Secretary in various regulations.[19] And this Court has been

[19] See, *e. g.*, Treas. Reg. § 1.368–3 (records to be kept by taxpayers who participate in tax-free exchanges in connection with a corporate reorganization); § 1.374–3 (records to be kept by a railroad corporation engaging in a tax-free exchange in connection with a railroad reorganization); § 1.857–6 (real estate investment trusts must keep records of stock ownership); § 1.964–3 (shareholders must keep records of their interest in a controlled foreign corporation); § 1.1101–4 (records must be kept by a stock or security holder who receives stock or securities or other property upon a distribution made by a qualified bank holding corporation); § 1.1247–5 (foreign investment company must keep records sufficient to verify what taxable income it may have); § 1.6001–1 (all persons liable to tax under subtitle A of the Internal Revenue Code shall keep records sufficient to establish gross income, deductions, and credits); § 31.6001 *et seq.* (requirements that various employers keep records of withholding under the Railroad Retirement Tax Act and the Federal Unemployment Tax Act); §§ 45.6001–2 to 45.6001–4 (records to be kept by manufacturers of butter and cheese); § 46.6001–2 (records to be kept by manufacturers of sugar); § 46.6001–4 (records to be kept by persons paying premiums on policies issued by foreign insurers). Treas. Reg. § 301.7207–1 provides for criminal penalties

faced with numerous cases involving similar recordkeeping requirements. Similar requirements imposed on the countless businesses subject to the Emergency Price Control Act during the Second World War were upheld in *Shapiro* v. *United States*, 335 U. S. 1 (1948), the Court observing that there was "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection . . . ." *Id.*, at 32. In *United States* v. *Darby*, 312 U. S. 100 (1941), the Court held that employers subject to the Fair Labor Standards Act could be required to keep records of wages paid and hours worked:

> "Since, as we have held, Congress may require production for interstate commerce to conform to [wage and hour] conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it." *Id.*, at 125.

We see no reason to reach a different result here. The plenary authority of Congress over both interstate and foreign commerce is not open to dispute, and that body was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of that commerce were significantly aiding criminal enterprise. The Secretary of the Treasury, authorized by Congress, concluded that copying and retention of certain negotiable instruments by the bank upon which they were drawn would facilitate the detection and apprehension of participants in such criminal

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for willful delivery or disclosure to the Internal Revenue Service of a document known by the person disclosing it to be false as to any material matter.

enterprises. Congress could have closed the channels of commerce entirely to negotiable instruments, had it thought that so drastic a solution were warranted; it could have made the transmission of the proceeds of any criminal activity by negotiable instruments in interstate or foreign commerce a separate criminal offense. Had it chosen to do the latter, under the precise authority of *Darby* or *Shapiro, supra,* it could have required that each individual engaging in the sending of negotiable instruments through the channels of commerce maintain a record of such action; the bank plaintiffs concede as much.[20]

The bank plaintiffs contend, however, that the Act does not have as its primary purpose regulation of the banks themselves, and therefore the requirement that the banks keep the records is an unreasonable burden on the banks. *Shapiro* and *Darby,* which involved legislation imposing recordkeeping requirements in aid of substantive regulation, are therefore said not to control. But provisions requiring reporting or recordkeeping by the paying institution, rather than the individual who receives the payment, are by no means unique. The Internal Revenue Code and its regulations, for example, contain provisions which require businesses to report income payments to third parties (26 U. S. C. § 6041 (a)), employers to keep records of certain payments made to employees (Treas. Reg. § 31.6001 *et seq.*), corporations to report dividend payments made to third parties (26 U. S. C. § 6042), cooperatives to report patronage dividend payments (26 U. S. C. § 6044), brokers to report customers' gains and losses (26 U. S. C. § 6045), and banks to report payments of interest made to depositors (26 U. S. C. § 6049).

[20] Brief for Appellant California Bankers Association in No. 72-985, p. 25.

In *Darby* an identifiable class of employer was made subject to the Fair Labor Standards Act, and in *Shapiro* an identifiable class of business had been placed under the Price Control Act; in each of those instances, Congress found that the purpose of its regulation was adequately secured by requiring records to be kept by the persons subject to the substantive commands of the legislation. In this case, however, Congress determined that recordkeeping alone would suffice for its purposes, and that no correlative substantive legislation was required. Neither this fact, nor the fact that the principal congressional concern is with the activities of the banks' customers, rather than with the activities of the banks themselves, serves to invalidate the legislation on due process grounds.

The bank plaintiffs proceed from the premise that they are complete bystanders with respect to transactions involving drawers and drawees of their negotiable instruments. But such is hardly the case. A voluminous body of law has grown up defining the rights of the drawer, the payee, and the drawee bank with respect to various kinds of negotiable instruments. The recognition of such rights, both in the various States of this country and in other countries, is itself a part of the reason why the banking business has flourished and played so prominent a part in commercial transactions. The bank is a party to any negotiable instrument drawn upon it by a depositor, and upon acceptance or payment of an instrument incurs obligations to the payee. While it obviously is not privy to the background of a transaction in which a negotiable instrument is used, the existing wide acceptance and availability of negotiable instruments is of inestimable benefit to the banking industry as well as to commerce in general.

Banks are therefore not conscripted neutrals in trans-

actions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance. Congress not illogically decided that if records of transactions of negotiable instruments were to be kept and maintained, in order to be available as evidence under customary legal process if the occasion warranted, the bank was the most easily identifiable party to the instrument and therefore should do the recordkeeping. We believe this conclusion is consistent with *Darby* and *Shapiro*, and that there is a sufficient connection between the evil Congress sought to address and the recordkeeping procedure it required to pass muster under the Due Process Clause of the Fifth Amendment.[21]

[21] Congress had before it ample testimony that the requirement that banks reproduce checks and maintain other records would significantly aid in the enforcement of federal tax, regulatory, and criminal laws. See House Hearings, *supra*, n. 1, at 151, 322, 359; Senate Hearings, *supra*, n. 1, at 61–68, 175, 230, 250–255, 282. While a substantial portion of the checks drawn on banks in the United States may never be of any utility for law enforcement, tax or regulatory purposes, the regulations do limit the check-copying requirement to checks in excess of $100. 31 CFR §§ 103.34 (b)(3) and (4). This $100 exception was added to the regulations since this litigation was instituted, see n. 5, *supra;* in reviewing the judgment of the District Court in this case, we look to the statute and the regulations as they now stand, not as they once did. *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) (*per curiam*); *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281 n. 38 (1969).

The California Bankers Association contends that the $100 exception is meaningless since microfilm cameras cannot discriminate between checks in different amounts. There was, however, testimony during the House Hearings that an additional step could be added to the check-handling procedures to sort out those checks not required to be copied, and that many banks have equipment that can sort checks on a dollar-amount basis. House Hearings, *supra*, n. 1, at 322, 359. In any event, it is clear that the Act and regulations do not require banks to microfilm all checks, which some

The bank plaintiffs somewhat halfheartedly argue, on the basis of the costs which they estimate will be incurred by the banking industry in complying with the Secretary's recordkeeping requirements, that this cost burden alone deprives them of due process of law. They cite no cases for this proposition, and it does not warrant extended treatment. In its complaint filed in the District Court, plaintiff Security National Bank asserted that it was an "insured" national bank; to the extent that Congress has acted to require records on the part of banks insured by the Federal Deposit Insurance Corporation, or of financial institutions insured under the National Housing Act, Congress is simply imposing a condition on the spending of public funds. See, *e. g.*, *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937); *Helvering* v. *Davis*, 301 U. S. 619 (1937). Since there was no allegation in the complaints filed in the District Court, and since it is not contended here that any bank plaintiff is not covered by FDIC or Housing Act Insurance, it is unnecessary to consider what questions would arise had Congress relied solely upon its power over interstate commerce to impose the recordkeeping requirements. The cost burdens imposed on the banks by the recordkeeping requirements are far from unreasonable, and we hold that such burdens do not deny the banks due process of law.[22]

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banks have traditionally done, but instead leave the decision to the banks. Given the fact that the cost burdens placed on the banks in implementing the recordkeeping requirements of the statute and regulations are also reasonable ones, see n. 22, *infra*, we do not think that the recordkeeping requirements are unreasonable.

[22] The only figures in the record as to the cost burdens placed on the banks by the recordkeeping requirements show that the Bank of America, one of the largest banks in the United States, with 997 branches, $29 billion in deposits, and a net income in excess of $178 million (Moody's Bank and Finance Manual 633–

The bank plaintiffs also contend that the record-keeping requirements imposed by the Secretary pursuant to the Act undercut a depositor's right to effectively challenge a third-party summons issued by the Internal Revenue Service. See *Reisman* v. *Caplin*, 375 U. S. 440 (1964); *Donaldson* v. *United States*, 400 U. S. 517 (1971); *Couch* v. *United States*, 409 U. S. 322 (1973). Whatever wrong such a result might work on a depositor, it works no injury to his bank. It is true that in a limited class of cases this Court has permitted a party who suffered injury as a result of the operation of a law to assert his rights even though the sanction of the law was borne by another, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and conversely, the Court has allowed a party upon whom the sanction falls to rely on the wrong done to a third party in obtaining relief, *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972). Whether the bank might in other circumstances rely on an injury to its depositors, or whether, instead, this case is governed by the general rule that one has standing only to vindicate his own rights, *e. g.*, *Moose Lodge* v. *Irvis*, 407 U. S. 163, 166 (1972), need not now be decided, since, in any event, the claim is premature. Claims of depositors against the compul-

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636 (1972)), expended $392,000 in 1971, including start-up costs, to comply with the microfilming requirements of Title I of the Act. Affidavit of William Ehler, App. 24–25.

The hearings before the House Committee on Banking and Currency indicated that the cost of making microfilm copies of checks ranged from 1½ mills per check for small banks down to about ½ mill or less for large banks. See House Hearings, *supra*, n. 1, at 341, 354–356; H. Rep. No. 91-975, *supra*, at 11. The House Report further indicates that the legislation was not expected to significantly increase the costs of the banks involved since it was found that many banks already followed the practice of maintaining the records contemplated by the legislation.

sion by lawful process of bank records involving the depositors' own transactions must wait until such process issues.

Certain of the plaintiffs below, appellants in No. 72–1196, including the American Civil Liberties Union, the Security National Bank, and various individual plaintiff depositors, argue that if "the dominant purpose of the Bank Secrecy Act is the creation, preservation, and collection of evidence of crime . . . [i]t is against the standards applicable to the criminal law, then, that its constitutionality must be measured." They contend that the recordkeeping requirements violate the provisions of the Fourth, Fifth, and First Amendments to the Constitution. At this point, we deal only with such constitutional challenges as they relate to the recordkeeping provisions of Title I of the Act.

We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process.

Plaintiffs urge that when the bank makes and keeps records under the compulsion of the Secretary's regulations it acts as an agent of the Government, and thereby engages in a "seizure" of the records of its customers. But all of the records which the Secretary requires to be kept pertain to transactions to which the bank was itself a party. See *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). The fact that a large number of banks voluntarily kept records of this sort before they were required to do so by regulation is an indication that the records were thought useful to the bank in the conduct of its

own business, as well as in reflecting transactions of its customers. We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities. See *First National Bank* v. *United States*, 267 U. S. 576 (1925), aff'g 295 F. 142 (SD Ala. 1924); *Donaldson* v. *United States*, *supra*, at 522. "[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress." *Id.*, at 537 (DOUGLAS, J., concurring).

Plaintiffs nevertheless contend that the broad authorization given by the Act to the Secretary to require the maintenance of records, coupled with the broad authority to require certain reports of financial transactions, amounts to the power to commit an unlawful search of the banks and the customers. This argument is based on the fact that 31 CFR § 103.45, as it existed when the District Court ruled in the case, permitted the Secretary to impose additional recordkeeping or reporting requirements by written order or authorization; this authority has now been deleted from the regulation; [23] plaintiffs thus argue that the Secretary could order the immediate reporting of any records made or kept under the compulsion of the Act. We, of course, must examine the statute and the regulations as they now exist. *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) (*per curiam*); *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281 n. 38 (1969). Even if plaintiffs were correct in urging that we decide the case on the basis of the regulation as it existed at the time the District Court ruled, their contention would be without merit. Whatever the Secretary *might* have authorized

[23] See n. 18, *supra*.

under the regulation, he did not in fact require the reporting of any records made or kept under the compulsion of the Act. Indeed, since the legislative history of the Act clearly indicates that records which it authorized the Secretary to require were to be available only by normal legal process, it is doubtful that the Secretary would have the authority ascribed to him by plaintiffs even under the earlier form of the regulation. But in any event, whether or not he had the authority, he did not exercise it, and in fact none of the records were required to be reported. Since we hold that the mere maintenance of the records by the banks under the compulsion of the regulations invaded no Fourth Amendment right of any depositor, plaintiffs' attack on the record-keeping requirements under that Amendment fails.[24] That the bank in making the records required by the Secretary acts under the compulsion of the regulation is clear, but it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.

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[24] Chapter 4 of the Act, § 241, 31 U. S. C. § 1121, authorizes the Secretary to require by regulation the maintenance of records by persons who engage in any transaction or maintain a relationship, directly or indirectly, on behalf of themselves or others, with a foreign financial agency. The Secretary has, by regulation, required the maintenance of such records by persons having such financial interests and by domestic financial institutions which engage in monetary transactions outside the United States. 31 CFR §§ 103.32, 103.33. The Act also provides that production of such records shall be compelled only by "a subpena or summons duly authorized and issued or as may otherwise be required by law." 31 U. S. C. § 1121 (b). Though it is not apparent from the various briefs filed in this Court by the plaintiffs below whether this particular record-keeping requirement is challenged, our holding that a mere requirement that records be kept does not violate any constitutional right of the banks or of the depositors necessarily disposes of such a claim, since there is no indication at this point that there has been any attempt to compel the production of such records.

Plaintiffs have briefed their contentions in such a way that we cannot be entirely certain whether their Fifth Amendment attack is directed only to the reporting provisions of the regulations, or to the recordkeeping provisions as well. To the extent that it is directed to the regulations requiring the banks to keep records, it is without merit. Incorporated banks, like other organizations, have no privilege against compulsory self-incrimination, *e. g.*, *Hale* v. *Henkel*, 201 U. S. 43, 74–75 (1906); *Wilson* v. *United States*, 221 U. S. 361, 382–384 (1911); *United States* v. *White*, 322 U. S. 694, 699 (1944). Since a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights, *Johnson* v. *United States*, 228 U. S. 457, 458 (1913); *Couch* v. *United States*, 409 U. S., at 328, the depositor plaintiffs here present no meritorious Fifth Amendment challenge to the recordkeeping requirements.

Plaintiff ACLU makes an additional challenge to the recordkeeping requirements of Title I. It argues that those provisions, and the implementing regulations, violate its members' First Amendment rights, since the provisions could possibly be used to obtain the identities of its members and contributors through the examination of the organization's bank records. This Court has recognized that an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in the organization, and that absent a countervailing governmental interest, such information may not be compelled. *NAACP* v. *Alabama*, 357 U. S. 449 (1958). See *Pollard* v. *Roberts*, 283 F. Supp. 248 (ED Ark.), aff'd *per curiam*, 393 U. S. 14 (1968).

Those cases, however, do not elicit a *per se* rule that would forbid such disclosure in a situation where the governmental interest would override the associational

interest in maintaining such confidentiality. Each of them was litigated after a subpoena or summons had already been served for the records of the organization, and an action brought by the organization to prevent the actual disclosure of the records.[25] No such disclosure has been sought by the Government here, and the ACLU's challenge is therefore premature. This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as *NAACP* v. *Alabama*, *supra*.[26] The threat to any First Amendment rights of the ACLU or its members from the mere existence of the records in the hands of the bank is a good deal more

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[25] The ACLU recognizes that these cases, and the other cases it cites involved situations in which a subpoena or summons had already issued. Brief for Appellant ACLU in No. 72–1196, p. 57. See *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *United States* v. *Rumely*, 345 U. S. 41 (1953).

[26] The ACLU contends that present injunctive relief is essential, since the banks might not notify it of the fact that their records have been subpoenaed, and might comply with the subpoena without giving the ACLU a chance to obtain judicial review. While noting that "most banks formally prohibit" it (citing American Banker, May 12, 1972, p. 1, cols. 3–4), the ACLU also contends that the "day-to-day practice of permitting 'informal' access to bank records is, unfortunately, widespread." Brief for Appellant ACLU in No. 72–1196, p. 58.

The record contains no showing of any attempt by the Government, formal or informal, to compel the production of bank records containing information relating to the ACLU; we accordingly express no opinion whether notice would in such an instance be required by either the Act or the Constitution.

remote than the threat assertedly posed by the Army's system of compilation and distribution of information which we declined to adjudicate in *Laird* v. *Tatum*, 408 U. S. 1 (1972).

IV

We proceed now to address the constitutional challenges directed at the reporting requirements of the regulations authorized in Title II of the Act. Title II authorizes the Secretary to require reporting of two general categories of banking transactions: foreign and domestic. The District Court upheld the constitutionality of the foreign transaction reporting requirements of regulations issued under Title II; certain of the plaintiffs below, appellants in No. 72–1196, have appealed from that portion of the District Court's judgment, and here renew their contentions of constitutional infirmity in the foreign reporting regulations based upon the First, Fourth, and Fifth Amendments. The District Court invalidated the Bank Secrecy Act insofar as it authorized the Secretary to promulgate regulations requiring banks to report domestic transactions involving their customers, and the Government in No. 72–1073 appeals from that portion of the District Court's judgment.

As noted above, the regulations issued by the Secretary under the authority of Title II contain two essential reporting requirements with respect to foreign financial transactions. Chapter 3 of Title II of the Act, 31 U. S. C. §§ 1101–1105, and the corresponding regulation, 31 CFR § 103.23, require individuals to report transportation of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the instrument transported or received has a value in excess of $5,000. Chapter 4 of Title II of the Act, 31 U. S. C. §§ 1121–1122, and the corresponding regulation, 31 CFR § 103.24, gen-

erally require United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions.

The domestic reporting provisions of the Act as implemented by the regulations, in contrast to the foreign reporting requirements, apply only to banks and financial institutions. In enacting the statute, Congress provided in § 221, 31 U. S. C. § 1081, that the Secretary might specify the types of currency transactions which should be reported:

> "Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe."

Section 222 of the Act, 31 U. S. C. § 1082, authorizes the Secretary to require such reports from the domestic financial institution involved, from the parties to the transactions, or from both. In exercising his authority under these sections, the Secretary has promulgated regulations which require only that the financial institutions make the report to the Internal Revenue Service; he has not required any report from the individual parties to domestic financial transactions.[27] The applicable regulation, 31 CFR § 103.22, requires the financial institution to "file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000." The regulation exempts several types of currency transactions

[27] See n. 29, *infra*.

from this reporting requirement, including transactions "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned." *Ibid.*

A. Fourth Amendment Challenge to the Foreign Reporting Requirements

The District Court, in differentiating for constitutional purposes between the foreign reporting requirements and the domestic reporting requirements imposed by the Secretary, relied upon our opinion in *United States* v. *U. S. District Court*, 407 U. S. 297 (1972), for the proposition that Government surveillance in the area of foreign relations is in some instances subject to less constitutional restraint than would be similar activity in domestic affairs. Our analysis does not take us over this ground.

The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established. *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 109 (1948); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933). Plaintiffs contend that in exercising that authority to require reporting of previously described foreign financial transactions, Congress and the Secretary have abridged their Fourth Amendment rights.

The familiar language of the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Since a statute requiring the filing and subsequent publication of a corporate tax return has been upheld against a Fourth Amendment challenge, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 174–176 (1911), reporting requirements are by no means

per se violations of the Fourth Amendment. Indeed, a contrary holding might well fly in the face of the settled sixty-year history of self-assessment of individual and corporate income taxes in the United States. This Court has on numerous occasions recognized the importance of the self-regulatory aspects of that system, and interests of the Congress in enforcing it:

> "In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil." *Helvering* v. *Mitchell*, 303 U. S. 391, 399 (1938).

To the extent that the reporting requirements of the Bank Secrecy Act and the settled practices of the tax collection process are similar, this history must be overcome by those who argue that the reporting requirements are a violation of the Fourth Amendment. Plaintiffs contend, however, that *Boyd* v. *United States*, 116 U. S. 616 (1886), establishes the invalidity of the foreign reporting requirement under the Fourth Amendment, and that the particular requirements imposed are so indiscriminate in their nature that the regulations must be deemed to be the equivalent of a general warrant of the kind condemned as obnoxious to the Fourth Amendment in cases such as *Stanford* v. *Texas*, 379 U. S. 476 (1965). We do not think these cases would support plaintiffs even if their contentions were directed at the domestic reporting requirements; in light of the fact that the foreign reporting requirements deal with matters in foreign commerce, we think plaintiffs' reliance on the cases to challenge those requirements must fail.

Boyd v. *United States, supra,* is a case which has been the subject of repeated citation, discussion, and explanation since the time of its decision 88 years ago. In *Communist Party* v. *SACB,* 367 U. S. 1 (1961), the Court described the *Boyd* holding as follows:

> "The *Boyd* case involved a statute providing that in proceedings other than criminal arising under the revenue laws, the Government could secure an order of the court requiring the production by an opposing claimant or defendant of any documents under his control which, the Government asserted, might tend to prove any of the Government's allegations. If production were not made, the allegations were to be taken as confessed. On the Government's motion, the District Court had entered such an order, requiring the claimants in a forfeiture proceeding to produce a specified invoice. Although the claimants objected that the order was improper and the statute unconstitutional in coercing self-incriminatory disclosures and permitting unreasonable searches and seizures, they did, under protest, produce the invoice, which was, again over their constitutional objection, admitted into evidence. This Court held that on such a record a judgment for the United States could not stand, and that the statute was invalid as repugnant to the Fourth and Fifth Amendments." *Id.,* at 110.

But the *Boyd* Court recognized that the Fourth Amendment does not prohibit all requirements that information be made available to the Government:

> "[T]he supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of

unreasonable searches and seizures." *Boyd* v. *United States, supra,* at 623–624.

Stanford v. *Texas, supra,* involved a warrant issued by a state judge which described petitioner's home and authorized the search and seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas." This Court found the warrant to be an unconstitutional general warrant, and invalidated the search and seizure conducted pursuant to it. Unlike the situation in *Stanford,* the Secretary's regulations do not authorize indiscriminate rummaging among the records of the plaintiffs, nor do the reports they require deal with literary material as in *Stanford;* the information sought is about commerce, not literature. The reports of foreign financial transactions required by the regulations must contain information as to a relatively limited group of financial transactions in foreign commerce, and are reasonably related to the statutory purpose of assisting in the enforcement of the laws of the United States.

Of primary importance, in addition, is the fact that the information required by the foreign reporting requirements pertains only to commercial transactions which take place across national boundaries. Mr. Chief Justice Taft, in his opinion for the Court in *Carroll* v. *United States,* 267 U. S. 132 (1925), observed:

> "Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.,* at 154.

This settled proposition has been reaffirmed as recently

as last Term in *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 272 (1973). If reporting of income may be required as an aid to enforcement of the federal revenue statutes, and if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to invalidate the Secretary's regulations here. The statutory authorization for the regulations was based upon a conclusion by Congress that international currency transactions and foreign financial institutions were being used by residents of the United States to circumvent the enforcement of the laws of the United States. The regulations are sufficiently tailored so as to single out transactions found to have the greatest potential for such circumvention and which involve substantial amounts of money. They are therefore reasonable in the light of that statutory purpose, and consistent with the Fourth Amendment.

B. Fourth Amendment Challenge to the Domestic Reporting Requirements

The District Court examined the domestic reporting requirements imposed on plaintiffs by looking to the broad authorization of the Act itself, without specific reference to the regulations promulgated under its authority. The District Court observed:

> "[A]lthough to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction

involving any monetary instrument—and in any amount—large or small." 347 F. Supp., at 1246.

The District Court went on to pose, as the question to be resolved, whether "these provisions, broadly authorizing an executive agency of government to require financial institutions and parties [thereto] . . . to routinely report . . . the detail of almost every conceivable financial transaction . . . [are] such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment." *Ibid.*

Since, as we have observed earlier in this opinion, the statute is not self-executing, and were the Secretary to take no action whatever under his authority there would be no possibility of criminal or civil sanctions being imposed on anyone, the District Court was wrong in framing the question in this manner. The question is not what sort of reporting requirements *might* have been imposed by the Secretary under the broad authority given him in the Act, but rather what sort of reporting requirements did he *in fact* impose under that authority.

"Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.' *Watson* v. *Buck*, 313 U. S. 387, 402." *Communist Party* v. *SACB*, 367 U. S., at 71.

The question for decision, therefore, is whether the regulations relating to the reporting of domestic trans-

actions, violations of which could subject those required to report to civil or criminal penalties, invade any Fourth Amendment right of those required to report. To that question we now turn.

The regulations issued by the Secretary require the reporting of domestic financial transactions only by financial institutions. *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), held that organizations engaged in commerce could be required by the Government to file reports dealing with particular phases of their activities. The language used by the Court in that case is instructive:

> "It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186. Although the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd* v. *United States*, 116 U. S. 616, *Hale* v. *Henkel*, 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale* v. *Henkel, supra; United States* v. *White*, 322 U. S. 694.
>
> "While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. *Cf. United States* v. *White, supra.* They are endowed with public attributes. They have a collective impact upon society, from

which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. [Citations omitted.] Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U. S., at 651–652.

We have no difficulty then in determining that the Secretary's requirements for the reporting of domestic financial transactions abridge no Fourth Amendment right of the banks themselves. The bank is not a mere stranger or bystander with respect to the transactions which it is required to record or report. The bank is itself a party to each of these transactions, earns portions of its income from conducting such transactions, and in the past may have kept records of similar transactions on a voluntary basis for its own purposes. See *United States* v. *Biswell*, 406 U. S., at 316. The regulations presently in effect governing the reporting of domestic currency transactions require information as to the personal and business identity of the person conducting the transaction and of the person or organization for whom it was conducted, as well as a summary description of the nature of the transaction. It is conceivable, and perhaps likely, that the bank might not of its own volition compile this amount of detail for its own purposes, and therefore to that extent the regulations put the bank in the position of seeking information from the customer in order to eventually report it to the Government. But as we have noted above, "neither

incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." *United States* v. *Morton Salt Co., supra,* at 652.

The regulations do not impose unreasonable reporting requirements on the banks. The regulations require the reporting of information with respect to abnormally large transactions in currency, much of which information the bank as a party to the transaction already possesses or would acquire in its own interest. To the extent that the regulations in connection with such transactions require the bank to obtain information from a customer simply because the Government wants it, the information is sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce, so as to withstand the Fourth Amendment challenge made by the bank plaintiffs. "[T]he inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" *United States* v. *Morton Salt Co., supra,* at 652–653; see *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 208 (1946).

In addition to the Fourth Amendment challenge to the domestic reporting requirements made by the bank plaintiffs, we are faced with a similar challenge by the depositor plaintiffs, who contend that since the reports of domestic transactions which the bank is required to make will include transactions to which the depositors were parties, the requirement that the bank make a report of the transaction violates the Fourth Amendment rights of the depositor. The complaint filed in the District Court by the ACLU and the depositors contains

no allegation by any of the individual depositors that they were engaged in the type of $10,000 domestic currency transaction which would necessitate that their bank report it to the Government. This is not a situation where there might have been a mere oversight in the specificity of the pleadings and where this Court could properly infer that participation in such a transaction was necessarily inferred from the fact that the individual plaintiffs allege that they are in fact "depositors." Such an inference can be made, for example, as to the recordkeeping provisions of Title I, which require the banks to keep various records of certain transactions by check; as our discussion of the challenges by the individual depositors to the recordkeeping provisions, *supra*, implicitly recognizes, the allegation that one is a depositor is sufficient to permit consideration of the challenges to the recordkeeping provisions, since any depositor would to some degree be affected by them. Here, however, we simply cannot assume that the mere fact that one is a depositor in a bank means that he has engaged or will engage in a transaction involving more than $10,000 in currency, which is the only type of domestic transaction which the Secretary's regulations require that the banks report. That being so, the depositor plaintiffs lack standing to challenge the domestic reporting regulations, since they do not show that their transactions are required to be reported.[28]

"Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the puta-

[28] We hold here and in other parts of this opinion that certain of the plaintiffs did not make the requisite allegations in the District Court to give them standing to challenge the Act and the regulations issued pursuant to it. In so holding, we do not, of course, mean to imply that such claims would be meritorious if presented by a litigant who has standing.

> tively illegal action before a federal court may assume jurisdiction.' *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' *Golden* v. *Zwickler*, 394 U. S. 103, 109–110 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–91 (1947)." *O'Shea* v. *Littleton*, 414 U. S. 488, 493–494 (1974) (footnote omitted).

We therefore hold that the Fourth Amendment claims of the depositor plaintiffs may not be considered on the record before us. Nor do we think that the California Bankers Association or the Security National Bank can vicariously assert such Fourth Amendment claims on behalf of bank customers in general.

The regulations promulgated by the Secretary require that a report concerning a domestic currency transaction involving more than $10,000 be filed only by the financial institution which is a party to the transaction; the regulations do not require a report from the customer. 31 CFR § 103.22; see 31 U. S. C. § 1082. Both the bank and depositor plaintiffs here argue that the regulations are constitutionally defective because they do not require

the financial institution to notify the customer that a report will be filed concerning the domestic currency transaction. Since we have held that the depositor plaintiffs have not made a sufficient showing of injury to make a constitutional challenge to the domestic reporting requirements, we do not address ourselves to the necessity of notice to those bank customers whose transactions must be reported. The fact that the regulations do not require the banks to notify the customer of the report violates no constitutional right of the banks, and the banks in any event are left free to adopt whatever customer notification procedures they desire.[29]

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[29] Plaintiffs similarly contend that the Secretary's regulation requiring the reporting of domestic currency transactions *only* by the banks or financial institutions which are parties thereto, violates a specific requirement of the Act. Section 222 of the Act, 31 U. S. C. § 1082, provides in pertinent part:

"The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require."

Plaintiffs contend that this language *requires* the Secretary to require either a signature on the report by the individual customer in the currency transaction, or a report from that customer. Since the Secretary has only required a report from the financial institution, plaintiffs urge, in addition, that there will not be notice to the individual customer of the report made by the financial institution.

In rebuttal, the Government urged in oral argument, Tr. of Oral Arg. 64–70, that not only does § 206 of the Act, 31 U. S. C. § 1055, give the Secretary broad authority to make exceptions to the requirements of the Act in promulgating the regulations, but that the House and Senate Reports on the bills considered by each house of the Congress, each of which contained a provision identical to the language of § 222, indicated that each chamber read that language differently. The Senate Committee believed that the language permitted the Secretary to require reports from the financial institution, the customer, *or* both, S. Rep. No. 91–1139, *supra*, at 15, while the House Committee felt that the language required

C. Fifth Amendment Challenge to the Foreign and Domestic Reporting Requirements

The District Court rejected the depositor plaintiffs' claim that the foreign reporting requirements violated the depositors' Fifth Amendment privilege against compulsory self-incrimination, and found it unnecessary to consider the similarly based challenge to the domestic reporting requirements since the latter were found to be in violation of the Fourth Amendment. The appeal of the depositor plaintiffs in No. 72–1196 challenges the foreign reporting requirements under the Fifth Amendment, and their brief likewise challenges the domestic reporting requirements as violative of that Amendment. Since they are free to urge in this Court reasons for affirming the judgment of the District Court which may not have been relied upon by the District Court, we consider here the Fifth Amendment objections to both the foreign and the domestic reporting requirements.

As we noted above, the bank plaintiffs, being corporations, have no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment. *Hale* v. *Henkel*, 201 U. S. 43 (1906). Their brief urges that they may vicariously assert Fifth Amendment claims on behalf of their depositors. But since we hold *infra* that those depositor plaintiffs who are actually parties in this litigation are premature in asserting any Fifth Amendment claims, we do not believe that the banks

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reports to be filed by both the financial institution and the customer, H. R. Rep. No. 91–975, *supra*, at 22.

We similarly do not reach this claim as it relates to the depositor plaintiffs since they failed to allege sufficient injury below. Whatever the merits of such a contention *vis-à-vis* the depositors, the regulation clearly has no adverse effect on any constitutional right of the banks, since the statute indisputably authorizes the Secretary to require a report from the bank.

under these circumstances have standing to assert Fifth Amendment claims on behalf of customers in general.

The individual depositor plaintiffs below made various allegations in the complaint and affidavits filed in the District Court. Plaintiff Stark alleged that he was, in addition to being president of plaintiff Security National Bank, a customer of and depositor in the bank. Plaintiff Marson alleged that he was a customer of and depositor in the Bank of America. Plaintiff Lieberman alleged that he had repeatedly in the recent past transported or shipped one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States, and expected to do likewise in the near future. Plaintiffs Lieberman, Harwood, Bruer, and Durell each alleged that they maintained a financial interest in and signature authority over one or more bank accounts in foreign countries. This, so far as we can ascertain from the record, is the sum and substance of the depositors' allegations of fact upon which they seek to mount an attack on the reporting requirements of regulations as violative of the privilege against compulsory self-incrimination granted to each of them by the Fifth Amendment.

Considering first the challenge of the depositor plaintiffs to the foreign reporting requirements, we hold that such claims are premature. In *United States* v. *Sullivan*, 274 U. S. 259 (1927), this Court reviewed a judgment of the Court of Appeals for the Fourth Circuit, 15 F. 2d 809 (1926), which had held that the Fifth Amendment protected the respondent from being punished for failure to file an income tax return. This Court reversed the decision below, stating:

> "As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that

> the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." 274 U. S., at 263–264.

Here the depositor plaintiffs allege that they intend to engage in foreign currency transactions or dealings with foreign banks which the Secretary's regulations will require them to report, but they make no additional allegation that any of the information required by the Secretary will tend to incriminate them. It will be time enough for us to determine what, if any, relief from the reporting requirement they may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information required by the Secretary, and the Secretary has overruled their claim of privilege. The posture of plaintiffs' Fifth Amendment rights here is strikingly similar to those asserted in *Communist Party* v. *SACB*, 367 U. S., at 105–110. The Communist Party there sought to assert the Fifth Amendment claims of its officers as a

defense to the registration requirement of the Subversive Activities Control Act, although the officers were not at that stage of the proceeding required by the Act to register, and had neither registered nor refused to register on the grounds that registration might incriminate them. The Court said:

> "If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue." *Id.*, at 107.

Plaintiffs argue that cases such as *Albertson* v. *SACB*, 382 U. S. 70 (1965), have relaxed the requirements of earlier cases, but we do not find that contention supported by the language or holding of that case. There the Attorney General had petitioned for and obtained an order from the Subversive Activities Control Board compelling certain named members of the Communist Party to register their affiliation. In response to the Attorney General's petitions, both before the Board and in subsequent judicial proceedings, the Communist Party members had asserted the privilege against self-incrimination, and their claims had been rejected by the Attorney General. A previous decision of this Court had held that an affirmative answer to the inquiry as to membership in the Communist Party was an incriminating admission protected under the Fifth Amendment. *Blau* v. *United States*, 340 U. S. 159 (1950). The differences then between the posture of the depositor plaintiffs in this case and that of petitioner in *Albertson* v. *SACB*, *supra*, are evident.

We similarly think that the depositor plaintiffs' challenges to the domestic reporting requirements are premature. As we noted above, it is not apparent from the allegations of the complaints in these actions that any of the depositor plaintiffs would be engaged in $10,000 domestic transactions with the bank which the latter would be required to report under the Secretary's regulations pertaining to such domestic transactions. Not only is there no allegation that any depositor engaged in such transactions, but there is no allegation in the complaint that any report which such a bank was required to make would contain information incriminating any depositor. To what extent, if any, depositors may claim a privilege arising from the Fifth Amendment by reason of the obligation of the bank to report such a transaction may be left for resolution when the claim of privilege is properly asserted.

Depositor plaintiffs rely on *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968), as supporting the merits of their Fifth Amendment claim. In each of those cases, however, a claim of privilege was asserted as a defense to the requirement of reporting particular information required by the law under challenge, and those decisions therefore in no way militate against our conclusion that depositor plaintiffs' efforts to litigate the Fifth Amendment issue at this time are premature.

D. Plaintiff ACLU's First Amendment Challenge to the Foreign and Domestic Reporting Requirements

The ACLU claims that the reporting requirements with respect to foreign and domestic transactions invade its associational interests protected by the First Amend-

ment. We have earlier held a similar claim by this organization to be speculative and hypothetical when addressed to the recordkeeping requirements imposed by the Secretary. *Supra*, at 55–57. The requirement that particular transactions be reported to the Government, rather than that records of them be available through normal legal process, removes part of the speculative quality of the claim. But the only allegation found in the complaints with respect to the financial activities of the ACLU states that it maintains accounts at one of the San Francisco offices of the Wells Fargo Bank & Trust Company. There is no allegation that the ACLU engages with any regularity in abnormally large domestic currency transactions, transports or receives monetary instruments from channels of foreign commerce, or maintains accounts in financial institutions in foreign countries. Until there is some showing that the reporting requirements contained in the Secretary's regulations would require the reporting of information with respect to the organization's financial activities, no concrete controversy is presented to this Court for adjudication. *O'Shea* v. *Littleton*, 414 U. S., at 493–494.

V

All of the bank and depositor plaintiffs have stressed in their presentations to the District Court and to this Court that the recordkeeping and reporting requirements of the Bank Secrecy Act are focused in large part on the acquisition of information to assist in the enforcement of the criminal laws. While, as we have noted, Congress seems to have been equally concerned with civil liability which might go undetected by reason of transactions of the type required to be recorded or reported, concern for the enforcement of the criminal law was undoubtedly prominent in the minds of the legislators who considered

the Act. We do not think it is strange or irrational that Congress, having its attention called to what appeared to be serious and organized efforts to avoid detection of criminal activity, should have legislated to rectify the situation. We have no doubt that Congress, in the sphere of its legislative authority, may just as properly address itself to the effective enforcement of criminal laws which it has previously enacted as to the enactment of those laws in the first instance. In so doing, it is of course subject to the strictures of the Bill of Rights, and may not transgress those strictures.[30] But the fact that a legislative enactment manifests a concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it. Having concluded that on the record in these appeals, plaintiffs have failed to state a claim for relief under the First, Fourth, and Fifth Amendments, and having concluded that the enactment in question was within the legislative authority of Congress, our inquiry is at an end.

On the appeal of the California Bankers Association in No. 72–985 from that portion of the judgment of the District Court upholding the recordkeeping requirements imposed by the Secretary pursuant to Title I, the judgment is affirmed. On the appeal of the bank and depositor plaintiffs in No. 72–1196 from that portion of the District Court's judgment upholding the recordkeeping requirements and regulations of Title I and the foreign reporting requirements imposed under the authority of Title II, the judgment is likewise affirmed. On the Gov-

[30] There have been recent hearings in Congress on various legislative proposals to amend the Bank Secrecy Act. Hearings to amend the Bank Secrecy Act (S. 3814 and S. 3828) before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972). See S. 3814 and S. 3828, 92d Cong., 2d Sess. (1972).

ernment's appeal in No. 72–1073 from that portion of the District Court's judgment which held that the domestic reporting requirements imposed under Title II of the Act violated the Constitution, the judgment is reversed. The cause is remanded to the District Court for disposition consistent with this opinion.

So ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion, but add a word concerning the Act's domestic reporting requirements.

The Act confers broad authority on the Secretary to require reports of domestic monetary transactions from the financial institutions and parties involved. 31 U. S. C. §§ 1081 and 1082. The implementing regulations, however, require only that the financial institution "file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a *transaction in currency of more than $10,000.*" 31 CFR § 103.22 (italics added). As the Court properly recognizes, we must analyze plaintiffs' contentions in the context of the Act as narrowed by the regulations. *Ante*, at 64. From this perspective, I agree that the regulations do not constitute an impermissible infringement of any constitutional right.

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations,

and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *United States* v. *U. S. District Court*, 407 U. S. 297, 316–317 (1972). As the issues are presently framed, however, I am in accord with the Court's disposition of the matter.

MR. JUSTICE DOUGLAS, dissenting.

I

The Court expresses a doubt that the California Bankers Association has standing to litigate the claims it asserts. That doubt, however, should be dissipated by our decisions.

Sierra Club v. *Morton*, 405 U. S. 727, 739, stated unequivocally that "an organization whose members are injured may represent those members in a proceeding for judicial review."

Appellants in No. 72–1196 are a national bank, a bank customer and depositor, a membership organization which is a customer of banks and receives money through banks for its members, a businessman who has engaged in and expects to engage in foreign financial transactions, and individuals having interests in or authority over foreign bank accounts. There can hardly be any doubt that these persons—at least the individuals and the membership organization—have standing. I think the same is true of the national bank in No. 72–1196 and the California Bankers Association in No. 72–985.

The claims the associations litigate in these cases are not only those of its members but also those of the depositors of those member banks. This will cost the banks, it is estimated, over $6 million a year. Certainly that is enough to give the banks standing. Moreover, they must spy on their customers. The Bank Secrecy Act requires banks to record and retain the details of their customers' financial lives. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the Court upheld the right of a representative litigant, a parochial school, to have standing to raise questions pertaining to the rights of parents, guardians, and children. See *Barrows* v. *Jackson*, 346 U. S. 249, 257. In *Eisenstadt* v. *Baird*, 405 U. S. 438, we upheld the standing of a distributor of contraceptives to assert rights of unmarried persons, since they were denied "a forum in which to assert their own rights." *Id.*, at 446. The question of standing has been variously described. But the "gist" of the question, we said in *Baker* v. *Carr*, 369 U. S. 186, 204, was whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." There is that "concrete adverseness" here; and that doubtless is the reason the Solicitor General does not raise the question which the Court now stirs.

II

The Act has as its primary goal the enforcement of the criminal law.[1] The recordkeeping requirements orig-

[1] The House Report, No. 91-975, p. 10, states:

"Petty criminals, members of the underworld, those engaging in 'white collar' crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs."

That was the reason for requiring the report of large domestic cash transactions. "Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or

inated according to Congressman Patman, author of the measure, with the Department of Justice and the Internal Revenue Service in response to two problems: (1) "A trend was developing in the larger banks away from their traditional practices of microfilming all checks drawn on them." 116 Cong. Rec. 16953. (2) As respects the identification of depositors, "A typical example might involve a situation where a person with a criminal reputation holds an account but does not personally make deposits or withdrawals." *Ibid.*

The purpose of the Act was to give the Secretary of the Treasury "primary responsibility" under Title II "to see to it that criminals do not take undue advantage

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its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials." *Id.*, at 11.

A sponsor on the floor of the House stated: "With respect to full financial recordkeeping, the problem can be simply stated; in the past decade, as organized crime and criminals have become more sophisticated, more and greater use has been made by criminal elements of our Nation's financial institutions. Law enforcement officials believe that an effective attack on organized crime requires the maintenance of adequate and appropriate records by financial institutions." 116 Cong. Rec. 16950.

Congressman Patman, author of the bill, stated: "This is really a bill which, if enacted into law, will be the longest step in the direction of stopping crime than any other we have had before this Congress in a long time." *Id.*, at 16951.

While it started with a different objective, it was changed to serve an additional purpose: "We also discovered that secret foreign bank accounts were not the only criminal activities related to the banking field. The major law enforcement authority—the Justice Department—of the U. S. Government called our attention to the urgent need for regulations which would make uniform and adequate the present recordkeeping practices, or lack of recordkeeping practices, by domestic banks and other financial institutions." *Id.*, at 16952.

of international trade and go undetected and unpunished." *Id.*, at 16954. He added: "I would be the first to admit that this legislation does not provide perfect crime prevention. However, it is felt that the legislation will substantially increase the risk of discovery of any criminal who undertakes to hide his activity behind foreign secrecy." *Id.*, at 16955.

The same purpose was reflected in the Senate. Senator Proxmire, the author of the Senate version of the bill, stated: "[T]he purpose of the bill is to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." [2] *Id.*, at 32627.

Customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts. That wall is not impregnable. Our Constitution provides the procedures whereby the confidentiality of one's financial affairs may be disclosed.

A

First, as to the recordkeeping requirements,[3] their announced purpose is that they will have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. §§ 1829b (a)(2), 1953 (a). The duty of the bank or institution is to microfilm or otherwise copy every check, draft, or similar instrument drawn on it or presented to it for payment and to keep

[2] The Senate Report, No. 91-1139, is replete with the same philosophy. See pp. 1, 5, 7, 8.

[3] The Act authorizes the Secretary to issue regulations to carry out its purposes, 12 U. S. C. § 1829b (b). It did empower him to define institutions or persons affected, 12 U. S. C. §§ 1953 (a), (b)(5), to make exceptions, exemptions, or other special arrangements, 12 U. S. C. §§ 1829b (c), (f); to seek injunctions, 12 U. S. C. § 1954; and to assess and collect civil penalties, 12 U. S. C. § 1955.

a record of each one "received by it for deposit or collection," 12 U. S. C. §§ 1829b (d)(1) and (2). The retention is for up to six years unless the Secretary determines that "a longer period is necessary," 12 U. S. C. § 1829b (g). The regulations[4] issued by the Secretary

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[4] Title 31 CFR § 103.34 provided that banks shall:

"(a) . . . secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

"(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

"(1) Each document granting signature authority over each deposit or share account;

"(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

"(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

"(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

"(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

"(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities,

show the depth and extent of the quicksand in which our financial institutions must now operate.[5]

It is estimated that a minimum of 20 billion checks—and perhaps 30 billion—will have to be photocopied and that the weight of these little pieces of paper will approximate 166 million pounds a year.[6]

It would be highly useful to governmental espionage to have like reports from all our bookstores, all our hard-

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or credit, of more than $10,000 to a person, account or place outside the United States;

"(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

"(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

"(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

"(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subparagraph shall be applicable only with respect to demand deposits." 37 Fed. Reg. 6914.

During this litigation the above provision was amended by the Secretary making it unnecessary to microfilm copies of checks "drawn for $100 or less," 31 CFR § 103.34 (b)(3) (1973). Since banks must copy all checks it is hard to see how this new exemption is meaningful.

[5] Like requirements are placed on brokers and dealers in securities, 31 CFR § 103.35.

[6] Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess., 320 (1969–1970).

ware and retail stores, all our drugstores. These records too might be "useful" in criminal investigations.

One's reading habits furnish telltale clues to those who are bent on bending us to one point of view. What one buys at the hardware and retail stores may furnish clues to potential uses of wires, soap powders, and the like used by criminals. A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way. The records of checks—now available to the investigators—are highly useful. In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on *ad infinitum*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

It is, I submit, sheer nonsense to agree with the Secretary that *all bank records of every citizen* "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." That is unadulterated nonsense unless we are to assume that every citizen is a crook, an assumption I cannot make.

Since the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests, a regulation impounding them and making them automatically available to all federal investigative agencies is a sledge-hammer approach to a problem that only a delicate scalpel can manage. Where fundamental personal rights are involved—as is true when as here the

Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like—the Act should be "narrowly drawn" (*Cantwell* v. *Connecticut*, 310 U. S. 296, 307) to meet the precise evil.[7] Bank accounts at times harbor criminal plans. But we only rush with the crowd when we vent on our banks and their customers the devastating and leveling requirements of the present Act. I am not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.

Heretofore this Nation has confined compulsory record-keeping to that required to monitor either (1) the record-keeper, or (2) his business. *Marchetti* v. *United States*, 390 U. S. 39, and *United States* v. *Darby*, 312 U. S. 100, are illustrative. Even then, as Mr. Justice Harlan writing for the Court said, they must be records that would "customarily" be kept, have a "public" rather than a private purpose, and arise out of an " 'essentially non-criminal and regulatory area of inquiry.' " *Marchetti* v. *United States*, *supra*, at 57.

Those requirements are in no way satisfied here, and yet there is saddled upon the banks of this Nation an estimated bill of over $6 million a year to spy on their customers.

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[7] And see *Roe* v. *Wade*, 410 U. S. 113, 155; *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 101; *Gooding* v. *Wilson*, 405 U. S. 518, 522; *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 151; *Cameron* v. *Johnson*, 390 U. S. 611, 617; *Zwickler* v. *Koota*, 389 U. S. 241, 250; *Whitehill* v. *Elkins*, 389 U. S. 54, 62; *Ashton* v. *Kentucky*, 384 U. S. 195, 201; *Elfbrandt* v. *Russell*, 384 U. S. 11, 18.

The same view is often expressed in concurring opinions. See *Doe* v. *Bolton*, 410 U. S. 179, 216 (DOUGLAS, J., concurring); *Gregory* v. *Chicago*, 394 U. S. 111, 119 (Black, J., concurring); *United States* v. *Robel*, 389 U. S. 258, 270 (BRENNAN, J., concurring in result).

B

Second, as to the *reporting* provisions of the Act, they require disclosure of two types of foreign financial transactions and relationships. One provision requires a *report* of transportation into or out of the country of monetary instruments exceeding $5,000.[8] Another requires parties to any transaction or relationship with "a foreign financial agency" to make such reports or make and keep such records as the Secretary may require.[9] Civil [10] and criminal [11] penalties are sanctions behind these *reporting* provisions.

The Act also requires the Secretary to make the *reported information* concerning transactions "available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government" upon request.[12] And to overcome any claims of self-incrimination it requires the grant of use immunity.[13]

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[8] 31 U. S. C. § 1101.

[9] 31 U. S. C. § 1121. The Secretary requires reports in yearly tax returns of any "financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country," 31 CFR § 103.24.

[10] 31 U. S. C. §§ 1056, 1102–1103; 31 CFR §§ 103.47–103.48.

[11] 31 U. S. C. §§ 1058–1059; 31 CFR § 103.49.

[12] 31 U. S. C. § 1061. The regulations read as follows:

"The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor." 31 CFR § 103.43.

[13] 31 U. S. C. § 1060. The Court in *Kastigar* v. *United States,* 406 U. S. 441, held that "use immunity" satisfies the Self-Incrimination Clause of the Fifth Amendment. I disagreed then and persist in my view that it is "transactional" immunity, not "use" immunity,

As respects domestic transactions the Secretary established two *reporting* requirements. (1) Routine reports are, with some exceptions, required concerning any transaction of more than $10,000 in currency from each financial institution involved.[14] The signature of at least one principal party to the transaction is required.[15] (2) The Secretary at the time of the trial reserved the right to grant exemptions from the requirements, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part.[16]

We said in *Katz* v. *United States*, 389 U. S. 347, 351-352: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to pre-

that is required to lift this constitutional protection. See *id.*, at 462–467 (dissenting opinion). But since "use" immunity is "the law" of the present Court—though I doubt if it can long survive—I do not write this dissent against the narrow immunity that is granted.

[14] 31 CFR § 103.22.

[15] 31 U. S. C. § 1082.

[16] At that time 31 CFR § 103.45 read as follows: "(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

"(b) The Secretary shall have the authority to further define all terms used herein."

Since then, the language "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify" has been deleted from § 103.45.

serve as private, even in an area accessible to the public, may be constitutionally protected." As stated in *United States* v. *White*, 401 U. S. 745, 752, the question is "what expectations of privacy" will be protected by the Fourth Amendment "in the absence of a warrant." A search and seizure conducted without a warrant is *per se* unreasonable subject to "jealously and carefully drawn" exceptions, *Jones* v. *United States*, 357 U. S. 493, 499. One's bank accounts are within the "expectations of privacy" category. For they mirror not only one's finances but his interests, his debts, his way of life, his family, and his civic commitments. There are administrative summonses for documents, cf. *Camara* v. *Municipal Court*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541. But there is a requirement that their enforcement receive judicial scrutiny and a judicial order, *United States* v. *U. S. District Court*, 407 U. S. 297, 313–318. As we said in that case, "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *Id.*, at 317.

Suppose Congress passed a law requiring telephone companies to record and retain all telephone calls and make them available to any federal agency on request. Would we hesitate even a moment before striking it down? I think not, for we condemned in *United States* v. *U. S. District Court* "the broad and unsuspected gov-

ernmental incursions into conversational privacy which electronic surveillance entails." *Id.*, at 313.

A checking account, as I have said, may well record a citizen's activities, opinion, and beliefs as fully as transcripts of his telephone conversations.

The Fourth Amendment warrant requirements may be removed by constitutional amendment but they certainly cannot be replaced by the Secretary of the Treasury's finding that certain information will be highly useful in "criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. § 1951 (b).

We cannot avoid the question of the constitutionality of the reporting provisions of the Act and of the regulations by saying they have not yet been applied to a customer in any criminal case. Under the Act and regulations the reports go forward to the investigative or prosecuting agency on written request without notice to the customer. Delivery of the records without the requisite hearing of probable cause [17] breaches the Fourth Amendment.

I also agree in substance with my Brother BRENNAN's view that the grant of authority by Congress to the Secretary of the Treasury is too broad to pass constitutional muster. This legislation is symptomatic of the

[17] A criminal prosecution in this country for not reporting an overseas transaction is still a criminal prosecution under the Bill of Rights; and to these the Fourth Amendment has been applicable from the beginning. Cases of immigration officers stopping people at the border who are leaving or entering the country are obviously inapposite and certainly the Court cannot be serious in saying that the monetary value of the article being seized is relevant to whether the search and seizure without a warrant was constitutional. As said in *Katz* it is "persons" not "places" that the Fourth Amendment protects; and it would labor the point to engage in lengthy argument that "things" as well as "places" are not the object of the Fourth Amendment's concerns.

slow eclipse of Congress by the mounting Executive power. The phenomenon is not brand new. It was reflected in *Schechter Corp.* v. *United States*, 295 U. S. 495. *United States* v. *Robel*, 389 U. S. 258, is a more recent example. *National Cable Television Assn.* v. *United States*, 415 U. S. 336, and *FPC* v. *New England Power Co.*, 415 U. S. 345, are even more recent. These omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of the teachings of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, as well as *Schechter*, that lawmaking is a congressional, not an Executive, function.

MR. JUSTICE BRENNAN, dissenting.

I concur in Parts I and II–A of MR. JUSTICE DOUGLAS' opinion. As to the Act's foreign and domestic reporting requirements, however, I see no need to address the independent constitutional objections the plaintiffs below attempt to raise. The reporting requirements are inseparable from—and in some cases considerably broader than—the recordkeeping requirements. Thus, since in my view the recordkeeping provisions unconstitutionally vest impermissibly broad authority in the Secretary of the Treasury, see *United States* v. *Robel*, 389 U. S. 258, 269 (1967) (BRENNAN, J., concurring in result), the reporting provisions, too, are invalid.

The symbiotic nature of the recordkeeping and reporting requirements is clearly manifested in the expressions of congressional purpose found in 12 U. S. C. § 1951 (b) and 31 U. S. C. § 1051, which lay down blanket commands that "records" and "reports" be required where they "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."

One example of this interdependence may be found in 12 U. S. C. §§ 1951–1953, which apply to "any uninsured

bank or uninsured institution," terms which are themselves not defined in the Act. Section 1953 authorizes the Secretary to require the keeping of "any records or evidence of any type" so long as he may require them of insured banks. Section 1952 authorizes him to require "the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein." As appears from the legislative history, these provisions work in tandem, permitting the Secretary to detect instances of the use of sham or illegal transactions in which the institutional party is merely an alter ego of the customer it purportedly services. See S. Rep. No. 91–1139, p. 3 (1970); Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess., 10–14 (1969–1970). Neither provision would usefully aid the detection of such practices without the other.

Not only are the reporting and recordkeeping requirements functionally inseparable, but the reporting provisions impose additional requirements, thus adding to the power of the Secretary to invade individual rights. For instance, the reporting requirement for all transactions involving domestic financial institutions, 31 U. S. C. § 1081, authorizes the Secretary to require reports at any time and in any manner and detail, of any transaction that involves the "payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify." Although the Secretary has by regulation limited the meaning of "monetary instruments," 31 CFR § 103.11, and invoked the section only where the transaction involves more than $10,000, see 31 CFR § 103.22, this in no way alters the fundamental vice of the statute.

That vice, see concurring opinion in *United States* v. *Robel, supra,* is the delegation of power to the Secretary in broad and indefinite terms under a statute that lays down criminal sanctions and potentially affects fundamental rights. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Cantwell* v. *Connecticut,* 310 U. S. 296, 304–307 (1940). My view in *Robel* applies here:

> "Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. '[S]tandards of permissible statutory vagueness are strict . . .' in protected areas. *NAACP* v. *Button,* 371 U. S., at 432. 'Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.' *Greene* v. *McElroy,* 360 U. S. 474, 507." 389 U. S., at 276.

In the case of the Bank Secrecy Act, also potentially involving First, Fourth, and Fifth Amendment rights of the vast majority of our citizenry, it exceeds Congress' constitutional power of delegation to empower the Secretary of the Treasury to require whatever reports and records he believes to be possessed of a "high degree of usefulness" where the purpose is to further "criminal, tax, or regulatory investigations or proceedings."

MR. JUSTICE MARSHALL, dissenting.

Although I am in general agreement with the opinions of my Brothers DOUGLAS and BRENNAN, I believe it important to set forth what I view as the essential issue in these cases.

The purposes of the recordkeeping requirements of the Bank Secrecy Act are clear from the language of the legislation itself—to require the maintenance of records which will later be available for examination by the Government in "criminal, tax, or regulatory investigations or proceedings." See 12 U. S. C. §§ 1829b (a)(2) and 1951 (b). The maintenance of the records is thus but the initial step in a process whereby the Government seeks to acquire the private financial papers of the millions of individuals, businesses, and organizations that maintain accounts in banks and use negotiable instruments such as checks to carry out the financial side of their day-by-day transactions. In my view, this attempt to acquire private papers constitutes a search and seizure under the Fourth Amendment.

As this Court settled long ago in *Boyd* v. *United States*, 116 U. S. 616, 622 (1886), "a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment to the Constitution . . . ." The acquisition of records in this case, as we said of the order to produce an invoice in *Boyd*, may lack the "aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers . . . ." *Id.*, at 622, but this cannot change its intrinsic character as a search and seizure. We do well to recall the admonishment in *Boyd*, *id.*, at 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

By compelling an otherwise unwilling bank to photocopy the checks of its customers, the Government has as much of a hand in seizing those checks as if it had forced

a private person to break into the customer's home or office and photocopy the checks there. See *Byars* v. *United States*, 273 U. S. 28 (1927). Compare *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), with *Lustig* v. *United States*, 338 U. S. 74, 78–79 (Frankfurter, J.). See also *Corngold* v. *United States*, 367 F. 2d 1 (CA9 1966). Our Fourth Amendment jurisprudence should not be so wooden as to ignore the fact that through microfilming and other techniques of this electronic age, illegal searches and seizures can take place without the brute force characteristic of the general warrants which raised the ire of the Founding Fathers. See *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765); *Stanford* v. *Texas*, 379 U. S. 476, 483–484 (1965). As we emphasized in *Katz* v. *United States*, 389 U. S. 347 (1967), the absence of any physical seizure of tangible property does not foreclose Fourth Amendment inquiry. *Id.*, at 352–353. The Fourth Amendment "governs not only the seizure of tangible items, but extends as well to the recording of oral statements . . . ." *Id.*, at 353. By the same logic, the Fourth Amendment should apply to the recording of checks mandated by the Act here. And such a massive and indiscriminate search and seizure, not only without a warrant but also without probable cause to believe that any evidence to be obtained is relevant to any investigation, is plainly inconsistent with the principles behind the Amendment. See *Stanford* v. *Texas*, *supra*, at 485–486; *Katz* v. *United States*, *supra*, at 356–359.

It is suggested that there is no seizure under the Fourth Amendment because the bank, which is required to create and maintain the record, is already a party to the transaction. See *ante*, at 52. Surely this is irrelevant to the question of whether a Government search or seizure is involved. The fact that one has disclosed private papers to the bank, for a limited purpose, within the context of

a confidential customer-bank relationship, does not mean that one has waived all right to the privacy of the papers. Like the user of the pay phone in *Katz* v. *United States*, who, having paid the toll, was "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," 389 U. S., at 352, so the customer of a bank, having written or deposited a check, has a reasonable expectation that his check will be examined for bank purposes only—to credit, debit or balance his account—and not recorded and kept on file for several years by Government decree so that it can be available for Government scrutiny. See *United States* v. *First Nat. Bank of Mobile*, 67 F. Supp. 616 (SD Ala. 1946).

The majority argues that any Fourth Amendment claim is premature, since the Act itself only affects the keeping of records and in no way changes the law regarding acquisition of the records by the Government. I cannot agree. This attempt to bifurcate the acquisition of information into two independent and unrelated steps is wholly unrealistic. As the Government itself concedes, "banks have in the past voluntarily allowed law enforcement officials to inspect bank records without requiring the issuance of a summons." Brief for Appellees in Nos. 72–985 and 72–1196, p. 38 n. 19. Indeed, the Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department told a Senate Subcommittee in 1972 that access by the FBI to bank records without process occurs "with some degree of frequency." Hearings to amend the Bank Secrecy Act (S. 3814 and S. 3828) before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., 114–115.

The plain fact of the matter is that the Act's record-keeping requirement feeds into a system of widespread

informal access to bank records by Government agencies and law enforcement personnel. If these customers' Fourth Amendment claims cannot be raised now, they cannot be raised at all, for once recorded, their checks will be readily accessible, without judicial process and without any showing of probable cause, to any of the several agencies that presently have informal access to bank records.

The Government suggests that the Act does not in any way preclude banks from refusing to allow informal access and insisting on the issuance of legal process before turning over a customer's financial records. Such a refusal, however, even if accompanied by notice to the customer with an opportunity for him to assert his constitutional claims, comes too late, for the seizure has already taken place. By virtue of the Act's recordkeeping requirement, copies of the customer's checks are already in the bank's files and amenable to process. The seizure has already occurred, and all that remains is the transfer of the documents from the agent forced by the Government to accomplish the seizure to the Government itself. Indeed, it is ironic that although the majority deems the bank customers' Fourth Amendment claims premature, it also intimates that once the bank has made copies of a customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records. See *ante*, at 53. By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late.

Nor can I accept the majority's analysis of the First Amendment associational claims raised by the American

Civil Liberties Union on behalf of its members who seek to preserve the anonymity of their financial support of the organization. The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure. See *NAACP* v. *Alabama*, 357 U. S. 449 (1958). See also *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *Gibson* v. *Florida Legislative Investigation Comm'n*, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *United States* v. *Rumley*, 345 U. S. 41 (1953). It is certainly inconsistent with this long line of cases for the Government, absent any showing of need whatsoever, to require the bank with which the ACLU maintains an account to make and keep a microfilm record of all checks received by the ACLU and deposited to its account. The net result of this requirement, obviously, is an easily accessible list of all of the ACLU's contributors. And, given the widespread informal access to bank records by Government agencies, see *supra*, at 96–97, the existence of such a list surely will chill the exercise of First Amendment rights of association on the part of those who wish to have their contributions remain anonymous. The technique of examining bank accounts to investigate political organizations is, unfortunately, not rare. See, *e. g.*, *Pollard* v. *Roberts*, 283 F. Supp. 248 (ED Ark.), aff'd *per curiam*, 393 U. S. 14 (1968); *United States Servicemen's Fund* v. *Eastland*, —— U. S. App. D. C. ——, 488 F. 2d 1252 (1973).

First Amendment freedoms are "delicate and vulnerable." They need breathing space to survive. *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). The threat of disclosure entailed in the existence of an easily accessible

list of contributors may deter the exercise of First Amendment rights as potently as disclosure itself. Cf. *ibid.* See also *United States Servicemen's Fund* v. *Eastland*, *supra*, at —, 488 F. 2d, at 1265–1268. More importantly, however slight may be the inhibition of First Amendment rights caused by the bank's maintenance of the list of contributors, the crucial factor is that the Government has shown no need, compelling or otherwise, for the maintenance of such records. Surely the fact that some may use negotiable instruments for illegal purposes cannot justify the Government's running roughshod over the First Amendment rights of the hundreds of lawful yet controversial organizations like the ACLU. Congress may well have been correct in concluding that law enforcement would be facilitated by the dragnet requirements of this Act. Those who wrote our Constitution, however, recognized more important values.

I respectfully dissent.